Nos. 83-6381 and 83-1660

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GILL PARKER, *et al.*, *Petitioners*,

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, *et al.*

CHARLES M. ATKINS, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE, *Petitioner*,

v.

GILL PARKER, *et al.*

On Writs Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR PARKER, *ET AL.*

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QUESTIONS PRESENTED*

1. Did the district court abuse its equitable discretion by requiring that future food stamp notices of the Massachusetts Department of Public Welfare comport with the minimum requirements of the Food Stamp Act?

2. Did the court of appeals violate the command of the Food Stamp Act by refusing to permit the restoration of benefits withheld without the prior, adequate notice required by the Act?

3. Whether the Commonwealth's Cross-Petition in No. 83-1660 should be dismissed as improvidently granted due to its failure to challenge the independent statutory basis for the decisions below.

4. Whether a notice of reduction or termination of need-based benefits which wholly failed to provide its recipients with any of the information needed to determine if an error had likely been made violated the Due Process Clause.

5. Whether Rule 52(a) contains an exception for factual determinations made in the context of constitutional adjudication.

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*Questions 1 and 2 address the issues presented in the petition of Parker, *et al.*, No. 83-6381, while questions 3-5 respond to the contentions of cross petitioner Atkins in No. 83-1660.

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BRIEF FOR PARKER, ET.AL.

OPINIONS BELOW

The opinion of the court of appeals [PA 1-38][1] is reported at 722 F.2d 933. The opinion of the district court [PA 42-98] is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1983. The petition in No. 83-6381 was filed on March 6, 1984. The conditional cross-petition, No. 83-1660, was filed on April 9, 1984. The petition and the cross-petition were granted on June 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Food Stamp Act, 7 U.S.C. § 2011 *et seq.*, and its implementing regulations, 7 C.F.R. Pt. 272, are set forth in Appendix A to this brief.

STATEMENT

Before this Court is the unappealed finding that the Massachusetts Department of Public Welfare (the Department) violated both the Food Stamp Act, 7 U.S.C. § 2020(e)(10), and one of its implementing regulations, 7 C.F.R. § 273.12(e)(2)(ii), by sending inadequate notice of a benefit reduction or termination to the plaintiff class. The issue presented by the plaintiffs is whether the First Circuit Court of Appeals erred in reversing the district court's exercise of its broad remedial discretion in fashioning relief for those violations. The trial court enjoined the Department from reducing a program participant's food stamp benefits in the future without first providing adequate advance warning, and ordered the restoration of the benefits that were found to have been with-

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[1] "PA" denotes the appendix to the petition in No. 83-1660. The Joint Appendix will be referred to as "JA."

held pursuant to the statutorily insufficient notice. In addition, the Department was instructed to develop regulatory standards to insure the comprehensibility and legibility of its future food stamp notices of reduction or termination, and to submit those proposed standards to the court for its inspection and approval.

It is not the plaintiffs' contention that the district court was required to afford them all of the relief it chose to grant. Rather, it is their position that it was well within the appropriate discretion of the court to do so, and that it was therefore impermissible for the appeals court to substitute its remedial preferences for the options chosen by the trier of fact. In order to evaluate the propriety of the remedy afforded, it is necessary to examine the context and purpose of the statutory provision that has been violated. Consequently, before reviewing the proceedings and results in the courts below, plaintiffs will set forth the basic contours and premises of the Food Stamp Program itself.

A. Statutory And Regulatory Framework

The Food Stamp Program is a need-based subsistence program created by Congress to alleviate hunger and malnutrition among this nation's low-income households. 7 U.S.C. § 2011; 7 C.F.R. § 271.1(a). Initially, it was designed with the goal of allowing such households to purchase sufficient stamps to provide each with a "nutritionally adequate diet." *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528, 529 (1973). Since the Court's review in 1973, however, Congress has acknowledged that "the best the food stamp program can do is to permit low income households 'to obtain a more nutritious diet' rather than permitting them to purchase a nutritionally adequate diet." H.R. Rep. 95-464, 95th Cong., 1st Sess. 423 (1977).[2]

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[2] The federal defendant suggests that the Thrifty Food Plan, upon which food stamp coupon allotments are based, is purposely inflated to provide for error tolerances. Federal Brief at 3 n.3. This is inaccurate. The Thrifty Food Plan is the least costly of four plans considered by U.S.D.A. and was

Although food stamp benefits are paid entirely from the United States Treasury, their actual distribution is administered by the individual states, pursuant to plans that must comply with the provisions of the Act and the implementing Department of Agriculture regulations. 7 U.S.C. §§ 2013(a), 2014(b) and 2020(d). In Massachusetts, the responsible agency is the Department of Public Welfare. It determines eligibility for benefits on a household basis, which focuses on individuals or groups who customarily purchase and prepare meals together. 7 U.S.C. § 2012(i). Households found to be eligible participate for a distinct certification period, which may vary in length from one to twelve months, depending on the predicted stability of household eligibility factors. 7 U.S.C. § 2012(c) and 7 C.F.R. § 273.10(f).

In order to ascertain whether a household is eligible for a monthly allotment of stamps, the Department must acquire, *inter alia*, information about the household's income, resources, family size, immigration status and living expenses. 7 U.S.C. § 2014(c), (d), (e) and (i). It must also determine that the household continues to remain eligible throughout its certification period and that it has neither been overpaid nor underpaid during that time. 7 U.S.C. § 2020(e)(4) and 7 C.F.R. § 273.12(c). Obviously, if each state agency had to independently acquire and update so much information for each potentially eligible participant, it would represent a staggering, if not impossible, task. Congress responded to this potential problem by creating a system in which the household itself has been made the primary source of both information about and verification of its individual circumstances. 7 U.S.C. § 2015(c), 7 C.F.R. § 273.2(f)(5), and 106 Code of Massachusetts Regulations (CMR) §§ 361.050 and 366.110. In fact, cooperation in the provision of information sufficient to allow the state agency to determine eligibility for and the amount of benefits is a program requirement. 7 U.S.C. § 2015(c)(1). If a

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designed to provide only 100% of the minimum Recommended Dietary Allowance for food nutrients. H.R. Rep. 95-464, *supra* at 186-187, 194 procedure 7, 197, 199 assumptions 9, 15 and 16.

household refuses to cooperate in making such information available, it is simply rendered ineligible to participate. 7 U.S.C. § 2015(c).

In addition to providing data necessary to a determination of their initial eligibility, households must also keep the agency abreast of any changes that might affect their ongoing participation. They are required to report, within ten days of their occurrence, such things as changes in income, resources, household composition, residence, shelter costs, medical expenses; even the acquisition of a licensed vehicle. 7 C.F.R. § 273.12(a). Again, Congress and the Secretary of the Department of Agriculture have chosen to make the participants the primary source of this data. This is understandable, for the nature of the information involved is highly individual and personal. Self-declaration, followed by verification only when deemed necessary, is probably the only system that could prove both reasonably accurate and administratively feasible. *See* 7 C.F.R. § 273.2(f)(2).

Given the vast amount of information and the degree of individual detail necessary to administer the Food Stamp Program, errors are of course inevitable. The sources of such errors are as varied as the list of human frailties. Participant error may be caused by an intentional misrepresentation, an unintentional provision of misinformation, or an inadvertent failure to report something that is germane to the calculation of benefits. Agency error may result from a failure to inform households of their responsibilities or a failure to act on information that has been provided. It may take the form of an incorrect numerical calculation or a misapplication of some rule to a given participant's situation. Errors may occur when an agency recalculates an individual's benefits because of a change specific to that person, or when the agency recalculates the benefits of large numbers of participants in response to a statutory or regulatory revision which changes the way in which the agency is accustomed to proceeding.[3]

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[3] Widespread changes in the Food Stamp Program triggered by legislative amendments to the Act have repeatedly been identified as a major source of

Congress has not chosen to ignore the fact that the program is prone to errors. It has, for example, enacted provisions that offer state agencies incentives to reduce mistakes by increasing the percentage of administrative costs that will be paid by the federal government if error rates are brought below designated levels. 7 U.S.C. § 2025(c). It has also provided that any errors that do nonetheless occur should be subject to challenge and redress. 7 U.S.C. §§ 2020(e)(10),(e)(11) and 2023(b).

The system created by Congress to redress agency errors is premised upon the availability of a fair hearing to challenge a proposed agency action. It would undoubtedly be administratively crippling if the Act required state agencies to conduct a hearing every time a program participant suffered a benefit reduction. The administrative resources necessary for such an undertaking would surely exceed those that are available. Congress, however, has not required as much. Rather, it has devised a system that balances the program's potentially conflicting needs for efficient administration and individual household protection. Again, as with the information necessary to determine eligibility and benefit levels, Congress has made the

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agency error. Representative Foley, then Chairman of the House Agriculture Committee, while addressing the House with regard to one of the proposed 1980 amendments to the Act, Pub. L. 96-249, stated:

> Let me tell my colleagues on the committee they should talk to their State agencies about what is causing errors. . . . They will tell you that Congress is constantly changing the provisions of the Act, which . . . is making it impossible for States trying to eliminate errors to be able to do so. 126 Cong. Rec. H3436 (daily ed. May 8, 1980).

And Senator Dole, long a major proponent of the Food Stamp Program, in discussing the impact that various proposed provisions of the Omnibus Budget Reconciliation Act of 1982, Pub. L. 97-253, would have on the program, noted that:

> Mr. President, there is little question in my mind that high error rates in the food stamp program are caused, at least in part, by the constant policy changes in the program. 128 Cong. Rec. S9915 (daily ed. August 5, 1982).

Senator Dole then quoted at length from two state agency administrators who had testified before the Senate Agriculture Committee that such program changes confused both workers and recipients and thereby increased error rates. 128 Cong. Rec. S9916.

participating household the primary resource for detecting and correcting potential errors, based on the premise that each household best knows the facts of its particular case. Only those households that feel they have been aggrieved by agency action and request a hearing are entitled to receive one. 7 U.S.C. § 2020(e)(10). If no hearing is requested, the proposed action takes effect, whether or not it is in fact correct. In this way, the vast majority of administratiave actions go unchallenged, thereby leaving the state agencies with sufficient resources to conduct the program. In order for the system to function, the Act and regulations contemplate that a household will receive an informative notice of any adverse action that the agency plans to take with regard to its grant, thus enabling it to decide whether or not to trigger the administrative review process by requesting a fair hearing. To complete these protections against potentially erroneous reductions of a participant's benefits, Congress has provided that if a household does timely request a hearing, its allotment may not be reduced until the hearing has been held and an adverse decision rendered. 7 U.S.C. § 2020(e)(10).

B. Background Facts

In August of 1981, Congress passed the Omnibus Budget Reconciliation Act (OBRA), one section of which changed the amount of the earned income disregard available to Food Stamp households from 20 percent to 18 percent. (Pub. L. 97-35, § 106; 95 Stat. 360). On September 4, 1981 the federal defendant promulgated regulations which required state agencies to implement this change no later than 90 days from October 1, 1981. 7 C.F.R. § 272.1(g)(35)(ii) [PA 44, Finding 2].

Massachusetts chose to implement the change in late November 1981, one month earlier than required [PA 93-94, Conclusion 15]. It therefore issued a notice to 19,654 food stamp households announcing the proposed change [PA 44, Finding 3]. In early December, plaintiffs commenced this action contending, *inter alia*, that the November notice failed to adequately inform the plaintiff class of the action being taken against them. On December 17, 1981, the district court issued a

temporary restraining order enjoining any reductions or terminations based on the November notice and ordering the reinstatement of any benefits already withheld. The court also certified the case as a class action.

On or about December 24, 1981, the Department issued a new notice dated December 26, 1981, again attempting to implement the change in the earned income disregard. This notice was reproduced in 5.75 to 6 point print on two standard size computer stock cards [PA 67-68, Findings 61-63]. The notice did not even tell affected participants whether their benefits were to be terminated or reduced, much less the amount of any reduction [PA 70-71, Findings 69-71, 73]. Moreover, the composition of the notice (*i.e.*, the language, line length, syntax and organization) made it very difficult to understand [PA 96, Conclusion 20]. It was impossible for a recipient to determine from the notice what action the Department intended to take or whether an error had been made [PA 70-71, Findings 69-73; 94-95, Conclusion 16].

Plaintiffs immediately filed a supplemental complaint attacking the adequacy of this notice and sought a second temporary restraining order. On December 31, 1981, the court denied plaintiffs' motion for temporary relief.

C. The District Court Trial

The district court consolidated plaintiffs' subsequent motion for a preliminary injunction with the trial on the merits and in October 1982 held a two day bench trial.

Plaintiffs introduced evidence from four program participants; Gill Parker, Cecelia Johnson, Stephanie Zades and Madeline Jones. All four were unable to understand the December notice primarily because of its poor organization and syntax [PA 52-54, 56, Findings 21, 22, 24 and 27]. They were unable to determine what action (a reduction or termination of benefits) the Department intended to take with regard to them or the dollar amount of any reduction in their benefits [PA 51-52, 54, Findings 21, and 24; 70-71, Findings 69-73]. They also had physical difficulty reading the December notice. Gill

Parker and Madeline Jones had to use a magnifying glass, while Stephanie Zades was not able to finish reading the notice due to eye strain [PA 53, 54, Findings 22 and 24].

Ms. Johnson, Mr. Parker and Ms. Zades all called their food stamp caseworkers in an effort to find out what was going to happen to their food stamps. In each case, the food stamp caseworkers were unable to provide any information at all [PA 51, 54, Findings 21 and 24; JA 139]. Ms. Jones also tried to reach her caseworker, but was informed he was not available [Court of Appeals App., Vol. III, 128 ¶ 8].[4]

Because they were unable to determine what was about to happen to their food stamp benefits, all four recipients appealed. Gill Parker's appeal became moot because he was recertified in December [PA 53, Finding 23; JA 140-141]. Stephanie Zades and Cecelia Johnson won their hearings because even at that time the Department files did not contain enough information to explain the basis for the proposed reductions [JA 132, 150]. Madeline Jones lost her appeal [PA 56, Finding 27].

The evidence demonstrated that there was a substantial risk of error with respect to the Department's efforts to implement the change in the earned income disregard [PA 88-91, Conclusions 8-11]. During October, November and December 1981, there was a massive data entry backlog in the Monthly Income Reporting System (MIRS) [PA 78-79, Findings, 93-94]. Of the approximately 16,000 food stamp households receiving the December notice, 9,191 of them participated in MIRS [PA 78, Finding 91]. If any of those households reported any change in their circumstances, including a change in income, in October or November 1981, it was more likely than not that the updated information was not utilized in implementing the change in the earned income disregard [PA 79, Finding 95]. Without the correct earned income figure in the computer, the amount of any reduction due to the change in the earned income disregard would be incorrect [PA 77-78,

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[4] Hereinafter referred to as, *e.g.*, III CAA 128.

Finding 90]. Because of this data entry backlog, the likelihood of error with respect to any MIRS household affected by the change (57.4% of the class) was increased [PA 80, Finding 97; 89, Conclusion 9].

The computer which the Department utilized to implement the change in the earned income disregard generated a report (the 902C Report) which listed each affected household. Included in this report was each household's old benefit amount, new benefit amount and earned income, as well as other household-specific data utilized to compute each household's food stamp benefits [PA 80, Finding 99; JA 43-44]. A random sampling of 5,013 of the approximately 16,000 cases listed on the 902C report showed 585 cases with no earned income which were erroneously sent the December notice [PA 81-83, Findings 101, 107]. Of these, 211 had their benefits erroneously changed [PA 81, Finding 102]. The random sampling done by the plaintiffs was only designed to uncover one of the most obvious computer programming mistakes (*i.e.*, reductions or terminations of households with no earned income). It could not uncover any errors made because of the use of the stale MIRS data, or those based upon other data or computational flaws [PA 82, Finding 105; II CAA 76, L16-19]. The sample page of the 902C Report in evidence shows two households with no earned income; one of which suffered a termination of its benefits, the other a reduction [JA 44].

The evidence also indicated, and the district court found, that both the Department and its computer programming counterpart, the Bureau of Systems Operations (BSO), were in a state of chaos in late 1981 due to the massive changes in the Food Stamp and AFDC Programs required by OBRA [PA 72, 73, Findings 76, 81; 89, Conclusion 9]. The district court concluded that the above factors, exacerbated by the wholly uninformative and incomprehensible nature of the notice, established a substantial risk of erroneous deprivation [PA 88-91, Conclusions 8-11; 95, Conclusion 17].

Evidence was also introduced with regard to the comprehensibility and legibility of the notice. The plaintiffs and the de-

fendants each introduced expert testimony concerning the reading difficulty of the notice. Both reading experts agreed that readability analysis involves both a quantitative statistical component (evaluation of word and sentence length and, in some tests, the difficulty of the vocabulary) and a qualitative analysis (evaluation of organization, syntax, and vocabulary) [PA 56, Finding 28]. The court specifically accepted the testimony of the plaintiffs' expert and found that using the Dale-Chall test, page one of the December notice tested objectively at a reading grade level of 9-10 and page two at a reading grade level of 11-12 [PA 57-58, Finding 31].[5] The results were even higher using the Fry Graph Test or the Fogg Formula [PA 60-61, Findings 39 and 41]. Utilizing the Flesh formula, page one tested objectively as fairly difficult (like a quality magazine), while page two tested objectively as difficult (like an academic journal) [PA 61, Finding 40]. The defendants' expert, although testifying that subjective analysis is vital to any text evaluation, did not proffer an opinion on the subjective difficulty of the December notice [JA 235]. Plaintiffs' expert, Dr. Conard, of the Harvard Graduate School of Education, stated that the organization of the December notice was poor [JA 27-28, 194]; that the extensive use of conditional sentences made it more difficult to understand [JA 28, 195]; that the inclusion of conflicting and confusing information made it misleading [JA 28, 195]; and that the use of small print further increased the reading difficulty of the notice [JA 196-197]. Dr. Conard concluded that *the December notice could not be understood by high school graduates* [JA 201].

Plaintiffs also introduced evidence showing that 45.8 percent of the heads of food stamp households with earned income in Massachusetts have not completed high school and that 82.2 percent of them have a twelfth grade education or less [PA 62, Findings 43 and 44]. By applying this data to her readability analysis of the December notice, Dr. Conard concluded that

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[5] Both defendants dismiss the importance of the first page of the notice in this case. But, because it was the first page, and was so poorly presented and so confusing, many recipients were unlikely even to reach the second page [JA 137, 150, 194-195].

about 80% of the food stamp recipients who received the notice could not be expected to understand it [JA 202]. The district court, relying upon this unrefuted evidence, as well as that establishing that the print size, line lengths, line and word spacing, typeface, use of upper case letters and poor production quality[6] all combined to make the December notice more difficult to read and understand [PA 68-69, Findings 64-68], concluded that:

> [T]he nature of the language and the format of the notice was (sic) not reasonably designed to convey the information contained. Although food stamp recipients are generally familiar with the terms used in the notice, the composition of the notice made it very difficult to understand especially considering the education level of most recipients [PA 96, Conclusion 20].

The court further found that the provision of an informative and comprehensible notice in this case was not only administratively feasible for the Department, but that it would have been administratively beneficial [PA 75-77, Findings 84-86; 94-95, Conclusion 16]. Relying upon the unrefuted testimony of Dr. Mark Bendick, an expert in the administration of public welfare programs, the district court found that an informative notice would benefit the Department by reducing the number of client visits and phone calls seeking only clarification, thereby freeing up the time of caseworkers for other tasks [PA 76-77, Finding 86; 94-95, Conclusion 16; JA 94-95, 99-100]. Further, based on the testimony of Harry Kreide, Deputy Director of B.S.O., the court also concluded that if the Department had asked B.S.O. to program the computer to include the relevant information in the December notice, it is likely that B.S.O. would have been able to do so without any difficulty or delay in the issuance of the notice [PA 75-76, Finding 84].

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[6] The December notice is reproduced at JA 4-5. This reproduction indicates the size and format of the original notice. It does not however accurately reflect the poor production quality of the original [PA 69, Finding 67]. Further, the print contrast in the reproduction is greater because it appears on a white background, not the orange and gold actually utilized. Plaintiffs respectfully refer the Court to an original notice which is included in the original papers from the district court as Plaintiffs' Exhibit 2.

Indeed, Mr. Kreide repeatedly emphasized that programming the computer to provide a notice containing such information was simple [JA 221, 224-227].

Finally, relying upon the testimony of Dr. Bendick and the experience of the Social Security Administration in rewriting its Supplemental Security Income notices at a sixth grade reading level, the court determined that it is administratively feasible for the Department to draft food stamp notices of reduction or termination at the fifth-sixth grade reading level without sacrificing the need for clarity or precision [PA 76, Finding 85; JA 105, 106, 113-114].

On March 24, 1983, the district court entered a carefully tailored Order granting declaratory and injunctive relief to the plaintiff class [PA 99-106]. Based upon its conclusion that the December notice violated both the Food Stamp Act and the Due Process Clause of the Fourteenth Amendment [PA 96-98, Conclusion 20-23], the court ordered that all future food stamp reduction or termination notices be mailed at least ten days prior to the proposed action and contain an explanation of the action, the benefit amount before and after the change and sufficient information to allow the recipient to determine whether an error has been made [PA 103-104, ¶ 5]. In addition, the Department was directed to draft regulations containing specific standards to ensure that future food stamp notices are legible and comprehensible [PA 102, ¶ 3]. Finally, the court ordered the defendants to return to each household in the plaintiff class all food stamp benefits lost as a result of the action taken pursuant to the December notice, but only until the earlier of the following: 1) the month following the date the household was next recertified for participation in the food stamp program; 2) the date the household was terminated or withdrew from participation in the food stamp program for reasons not related to the change in the earned income disregard; or 3) the date the household received a legally sufficient notice of the change [PA 101, ¶ 2].[7]

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[7] Other aspects of the court's order regarding the provision of multi-lingual notices were not challenged by the defendants in the court of appeals, nor are they at issue here.

The provisions of the district court's March 24, 1983 Order were incorporated into its judgment entered on March 25, 1983. Both the state and federal defendants appealed from this judgment and obtained a stay during the pendency of the proceedings before the Court of Appeals for the First Circuit.

D. The Decision Of The Court Of Appeals

On December 7, 1983, the court of appeals entered its decision and judgment affirming the district court's disposition on the merits of plaintiffs' claims, but reversing both the prospective injunctive relief and the restitution of the wrongfully withheld benefits. The First Circuit found that the "record reveals ample support for the court's conclusion that the December notice was difficult to read, relatively difficult to comprehend, ambiguous . . . , and that it lacked the specific information necessary to allow recipients to determine if a calculation (sic) [error] had been made" [PA 21]. Due to these deficiencies, compounded by the significant risk of error, the appellate court concluded that the December notice violated the Due Process Clause of the Fourteenth Amendment [PA 24-25]. Alternately, after parsing the language of 7 U.S.C. § 2020(e)(10), the court determined that the December notice had to comport with its requirements [PA 29], but had not because it was neither timely nor informative [PA 29-32].

The First Circuit next addressed the appropriateness of the district court's equitable decree. It reversed that portion of the order restoring the wrongfully withheld benefits to the class because it felt that such relief would result in some recipients receiving benefits in excess of the substantive levels established by Congress [PA 33]. In lieu of the restitution remedy fashioned by the district court, the court of appeals directed the Department to engage in a file review to attempt to uncover and reimburse any households which suffered substantively erroneous reductions or terminations [PA 35-37].

Finally, the appeals court also reversed the district court's award of prospective injunctive relief regarding the form and content of future food stamp notices. It based this action upon its observation that the Department had not acted in bad faith,

and its unsubstantiated belief that it would strive to do better in the future [PA 37-38].[8]

SUMMARY OF ARGUMENT

Congress has developed what can only be described as an ingenius system to accomodate the numerous and at times conflicting needs of administrators and participants in the Food Stamp Program. Households are utilized as the primary source of the vast amount of personal data required to make accurate eligibility and allotment decisions, and are entrusted with the primary responsibility for detecting and bringing to the agency's attention any errors in the computation of their benefits. To help participants accomplish the latter task, Congress has provided a delicately balanced notice and hearing system that requires informative notices of reductions or terminations in food stamp allotments so that the hopefully small number of families who are being wrongfully treated will be able to discover impending errors and freeze their current

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[8] Regrettably, this surmise has proved unwarranted. Since the First Circuit decision, the Department has implemented another so-called mass change due to the January 1984 cost of living adjustments in Social Security benefits. A copy of the relevant portions of the Department's instructions to the field regarding implementation of this change is annexed hereto as Appendix B. Although the mass change notice this time provided the old and new food stamp benefit amounts, it again did not provide a sufficient factual basis for the proposed action to allow its recipient to make an informed determination of whether an error had likely been made. The Department also did not require the provision of advance notice despite the First Circuit's explicit holding that such notice is required. (Appendix B at 4a, 7a).

Further, despite the purported mechanical nature of the change, errors were clearly made. A copy of a notice sent to one client informing her of a $48.00 reduction in her food stamp benefits due to these changes is annexed hereto as Appendix C (with identifying data deleted for confidentiality purposes). There is nothing contained in the notice which would cause the average person to realize that an error had been made. Yet, for the amount of the reduction to be correct based on the reason given, the client would have to be receiving $4,571.43 per month in Social Security benefits. Since no one can receive that amount, perhaps it would have helped the Department as well as the household to have provided the factual basis for its proposed action.

level of participation by requesting a hearing. 7 U.S.C. § 2020(e)(10).

Both lower courts determined that the Department could not legally, but did, dispense with the adequate advance notice required by the Act. They found such an omission especially egregious in light of the errors likely to have been generated by reducing or terminating the benefits of thousands of food stamp households, based on the earned income of each, by means of a major alteration to the Department's complex computer master file at a time of severe programmer shortages and data entry backlogs.[9] Neither defendant has appealed that part of the judgment of the court of appeals which determined that the Department had violated § 2020(e)(10) of the Act. That finding is therefore not before the Court. Because it provides an independent basis for the decision below, it renders unnecessary and therefore inappropriate consideration of the constitutional issues raised in the Department's cross-petition, No. 83-1660. Consequently, the cross-petition should be dismissed as improvidently granted.

Despite knowing that its systems were under stress and subject to error, the Department chose to implement the change in the earned income disregard a month early and to use an uninformative notice to do so. Even after that initial notice was successfully challenged in court by means of a T.R.O., the Department did not bother to inquire whether its programmers could provide the information desired by the program's participants. Had it done so, it would have found that the task was simple to accomplish. Certainly, in such circumstances, it

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[9] The chaotic state of affairs at B.S.O. and the magnitude of the task involved in reprogramming the master file to accomplish what the defendants have characterized as a minor computational change were described in detail by Harry Kreide, Deputy Director of the B.S.O. [JA 221-223]. As to the latter subject, he stated:

> This particular change was not what I would call a small change, not because of the notification that was sent to Food Stamp recipients or the information on that card, but because of the change to the programs that maintain the master file. That is where the significant change occurred [JA 221].

was well within the discretion of the district court to enter a prospective injunction requiring the Department to issue comprehensible notices that would comply with the provisions of § 2020(e)(10). Such relief is designed to act as a deterrant to future violations, not as punishment for past misconduct. Indeed, the Department's recent issuance of another "mass change" notice[10] that did not comply with the requirements set forth in the clear declaration of the First Circuit indicates that the injunction issued by the district court was not only appropriate, but apparently necessary to protect households from the Departments' ongoing lack of concern for the requirements of § 2020(e)(10). Future events have therefore demonstrated in this case exactly why it was impermissible for the court of appeals to substitute its remedial preferences for those of the district court, based upon an unsubstantiated surmise as to the likely future conduct of the Department.

The district court was also correct in ordering the restoration of the benefits that the Department withheld in violation of § 2020(e)(10). This is because Congress has provided that any benefits "wrongfully withheld shall be restored" to any household that challenges the illegal agency action, whether administratively or in court. 7 U.S.C. § 2023(b). This statutory remedy is designed to accomplish two related program goals. First, it encourages participants to come forward with any complaints about agency procedures, and not to suffer silently whatever unauthorized action may befall them. Second, it vests in participating households the perception that they are not the only ones who are required to follow the dictates of the program, thus fostering the respect necessary to insure that the Act's reporting system, which is based primarily on the good faith of those households, will not totally break down. Thus, restoration of the benefits illegally withheld by the Department responds to the command of § 2023(b) in particular, and furthers the underlying objectives of the Food Stamp Act generally.

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[10] See Appendices B and C.

Because the Act specifically grants each household an entitlement to undiminished benefits during its certification period until it has been afforded a meaningful opportunity to challenge a proposed reduction, program participants possess a property interest in the receipt of those benefits that requires the provision of notice whenever a reduction or termination is contemplated by a state agency. This entitlement to meaningful notice is not negated or reduced because many households happen to be simultaneously suffering a reduction based on the individual facts of their specific cases. Indeed, where, as here, the attempt to reduce thousands of families at once caused errors to occur at a rate over two times that of the professed norm, due process would seem to require better, not worse, notice. This is especially true in light of the fact that the provision of adequate notice would have cost the agency nothing but the price of ink, which would have been more than recouped by the uncontested administrative savings that would have resulted [JA 224; PA 76-77, Finding 86]. In such circumstances, a notice that does not provide useful information, that is produced so poorly that it can hardly be deciphered, and that is so difficult to read that over eighty percent (80%) of its recipients cannot be expected to understand it does not constitute reasonable notice. Such a notice certainly does not meet either the rigorous demands of § 2020(e)(10) or the minimum requirements of the Due Process Clause.

In reaching the latter determination, it was entirely appropriate for the court of appeals to review the district court's findings under the standard of Rule 52(a) of the Federal Rules of Civil Procedure. The detailed and complex factual development undertaken in this case was surely best left to the trier of fact, whose first-hand observations and judgment are entitled to substantial deference. While the record in this case is replete with support for each conclusion reached after trial, the practice of limiting appellate review to a search for clearly erroneous findings remains a wise one grounded in the appropriate functions of the various courts. Certainly in the current case, where the standard of Rule 52(a) is reinforced by this Court's "two-court rule", an independent review of the facts would seem both unnecessary and ill-advised.

ARGUMENT

POINT I

THE JUDGMENT OF THE TWO LOWER COURTS THAT THE DECEMBER NOTICE VIOLATED THE FOOD STAMP ACT HAS NOT BEEN APPEALED AND SHOULD NOT BE DISTURBED.

A. The Department's Cross-Petition For Certiorari Did Not Challenge The Determination That The December Notice Violated The Food Stamp Act And Its Implementing Regulations

Both the district court and the First Circuit found that the notice at issue in this case did not comport with the mandate of 7 U.S.C. § 2020(e)(10) [PA 98, 29-30]. Each court further determined that the Department's efforts to notify program participants of the proposed reductions and terminations did not even satisfy the requirements of 7 C.F.R. § 273.12(e)(2)(ii) (the so-called "mass change" notice regulation) [PA 98, 30-31]. In his cross-petition for certiorari, the state Commissioner questioned only the standard of review employed by the court of appeals and its conclusion that the December notice violated the dictates of due process. The Secretary of Agriculture did not seek any review of the judgment below and in fact opposed both petitions that were filed. Consequently, pursuant to Supreme Court Rules 21.1(a) and 34.1(a), the determination that the challenged notice violated § 2020(e)(10) and 7 C.F.R. § 273.12(e)(2)(ii) is not properly before this Court. *Local 1976, United Brotherhood of Carpenters* v. *N.L.R.B.*, 357 U.S. 93, 96 n.1 (1958) ("We therefore find it unnecessary to consider other contentions now made by petitioners on issues resolved against them by both the Board and the Court of Appeals . . .").

Nonetheless, the Secretary suggests that a challenge to the statutory basis for the First Circuit's decision is fairly subsumed in the state petitioner's challenge to the constitutional holdings because, in his view, the former was merely part and parcel of the latter. The opinion below, however, reveals that

the court of appeals specifically examined the statute and concluded, as an independent and alternate basis for its decision, that the December notice had not met its requirements.

The First Circuit's statutory analysis initially responds to an argument raised by the Secretary that § 2020(e)(10) only applies to those situations in which his regulations mandate a "notice of adverse action". *See* 7 C.F.R. § 273.13. Noting that Congress explicitly allowed an exception where reductions are based on a household's "written statement" requiring such action, the court concluded that § 2020(e)(10) was designed "to require the provision of advance notice in all other circumstances (fn. omitted)" [PA 30].

Having determined that the statute required advance notice in this case, the court of appeals proceeded to consider the nature of that notice. It is here that the state petitioner and the Secretary have misconstrued the import of the court's analysis. The First Circuit did not rule that the notice violated § 2020(e)(10) simply because it violated the Constitution. Rather, the decision clearly provides [PA 31]:

> The district court found the December notice unconstitutional because the notice failed to convey meaningful information to affected recipients. We believe the notice failed to satisfy statutory requirements for the same reason—the notice in question failed to inform recipients.

The court found that the statute, by its language and structure, required advance notice that conveyed meaningful information to its recipients. The court's subsequent observation that "[w]e doubt that Congress intended a constitutionally deficient notice to satisfy the statutory notice requirement" [PA 31], served as nothing more than a restatement of this Court's oft-noted assumption of "congressional solicitude for fair procedure, absent explicit statutory language to the contrary." *Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979). The First Circuit read the explicit statutory language to mandate a meaningful notice as part of this fair procedure, and, thus, concluded that the December notice did not comply with the statute's dictate.

It is therefore apparent that the court of appeals did in fact develop and decide the statutory issue as an independent, alternative ground for its decision. Because that aspect of its judgment has not been appealed, plaintiffs strongly urge the Court to leave it undisturbed and reject the Secretary's belated attempt to "smuggl[e] additional questions into a case after we granted certiorari." *Irvine* v. *People of the State of California*, 347 U.S. 128, 129 (1954).

The state petitioner, while noting the lower courts' "independent findings that the notice violated § 2020(e)(10) of the Food Stamp Act", nonetheless urges the Court to consider the due process questions it wishes to have heard. State Brief at 26 n.17. No authority is offered for this novel proposition that the Court should bypass an unappealed, independent statutory decisional ground in order to reach the fertile field of constitutional adjudication. This is almost certainly because the relevant case law indicates an opposite approach. Numerous cases decided as early as *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347 (1936), and as recently as last term repeat the "well established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case". *Escambia County, Florida* v. *McMillan*, ___ U.S. ___, 104 S. Ct. 1577, 1579 (1984) (*per curiam*). In *Escambia*, the Court declined to consider the proffered constitutional challenge because it glimpsed a possible alternative statutory ground to support the judgment below; one that had been considered by the district court but not by the court of appeals. It therefore remanded the case for that purpose. Here, both lower courts considered the statutory claims and both decided them in the plaintiffs' favor. In such circumstances, it is hard to imagine a justification for the suggestion that the Court should ignore its "long standing practice against unnecessary constitutional adjudication" (State Brief at 26 n.17) and partake in just such an exercise. To the contrary, the plaintiffs suggest that this case is one in which it is particularly appropriate to apply the

Court's normal rules. Each of the questions presented by the state petitioner calls for the examination of broad constitutional issues, ranging from the constitutional standard for meaningful notice to that of judicial review. However, the statutory ground for the decisions below can fairly be read to obviate the need for consideration of any of the questions raised in the cross-petition. The issue of the appropriate standard of review to be employed is clearly resolved for cases premised on a statutory violation. *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982). Further, even assuming *arguendo* that the need for notice in this case has not already been determined by *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), and its progeny (Point IV, *infra* at 58-59), it would certainly be inappropriate to consider the issue in a case where, as even the cross-petitioner admits, federal law nevertheless requires that it be provided. State Brief at 33 n.18. Finally, although plaintiffs did not argue the point below, it seems a fair, if not necessary, inference that any statute that requires notice to be sent inherently contains the requirement that it be minimally legible and comprehensible to its intended recipients.[11] This being the case, the lower courts' holdings that § 2020(e)(10) required meaningful advance notice provides a statutory basis for all of the relief afforded by the district court and renders unnecessary the broad-based constitutional decision sought by the state petitioner.

Consequently, plaintiffs vigorously contend that the Court should not accept the invitation to ignore its rules in this case. Rather, it is respectfully submitted that the Court should

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[11] In the context of notices of adverse action, the Secretary has required that the relevant information be provided "in easily understandable language." 7 C.F.R. § 273.13(a)(2). While the First Circuit found that a notice of adverse action was not required in this case, it is difficult to conceive of a rationale for assuming that Congress did not intend the same common-sense requirement to apply to the adequate advance notice mandated by § 2020(e)(10).

dismiss as improvidently granted the cross-petition for certiorari.[12]

B. The Lower Courts Were Correct In Determining That The December Notice Had To, But Did Not, Comport With The Requirements Of 7 U.S.C. § 2020(e)(10) And 7 C.F.R. § 273.12(e)(2)(ii)

Were this Court to review the statutory holding of the court of appeals, it would find it to be unquestionably correct. The purpose of § 2020(e)(10) within the Food Stamp Program, its language and structure, and its history all dictate the conclusion that it required the Department to send adequate advance notice of the reductions and terminations at issue here.

As noted earlier in the plaintiffs' overview of the Food Stamp Program, Congress has created a system in which the program's participants are the primary source of information, verification, and error detection and correction (*supra* at 3, 6). Section 2020(e)(10) is designed to be the primary vehicle for accomplishing the latter task. It mandates that a state agency provide aggrieved households with the opportunity to request a fair hearing to challenge any "action of the state agency under any provisions of its plan of operation as it affects the participation of such household in the food stamp program . . ." The section further provides that for "agency action[s] reducing or terminating [the household's] benefits within the household's certification period", "individual notice" shall be sent sufficiently in advance of the proposed "adverse action" to allow the family to request a hearing and thereby freeze its benefits at the level existing "immediately prior" to receipt of the notice. If a hearing is sought, benefits continue at the prior level unless and until an "adverse decision" is rendered. Through these provisions, households confronted with a proposed reduction or termination of their allotments are granted

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[12] Plaintiffs, of necessity, nevertheless address in this brief each of the contentions raised by the cross-petition. They do not wish this to be construed as a concession that the cross-petition should be reached or that the statutory finding below is properly before the Court.

an entitlement to undiminished benefits until they have been afforded a meaningful opportunity to seek correction of any error that they may detect. So much of the statute's requirements have not been contested, either by the Commonwealth or the Secretary.[13]

Rather, the Secretary argues that § 2020(e)(10) does not apply to those situations in which large numbers of households are simultaneously confronted with an "agency action reducing or terminating . . . benefits", situations which he describes as "mass changes". This contention was rejected by the court of appeals and is unsupported by either the language or history of the section.

While conceding that notice and an opportunity to be heard are generally required by § 2020(e)(10), the Secretary attempts to support his narrow view of its scope by noting that "no notice or hearing procedures are prescribed by statute in the case of . . . 'mass changes' ". Federal Brief at 21. But this observation places the cart squarely before the horse. The point is that the statute provides no exception for so-called "mass changes". Section 2020(e)(10) by its terms addresses those situations in which a household is facing an "agency action reducing or terminating its benefits". This is an inclusive phrase that defines which actions trigger the requirement for advance notice and the opportunity to freeze one's benefit level by seeking a hearing. Its effect is nowhere limited by the number of participants who may find themselves in the same boat. If a "mass change" is one which results in an agency action reducing or terminating a household's benefits, § 2020(e)(10) by its plain terms is applicable to the situation.

The Secretary's suggestion that the statute somehow contains a hidden exception for what he terms "mass changes" is further belied by another provision of the same section. As the First Circuit found in its consideration of the statute, and as the Secretary acknowledges (Federal Brief at 4 n.5), Congress

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[13] Indeed, the state petitioner has chosen not to address the requirements of § 2020(e)(10) at all.

has granted state agencies one exception to the rule that adequate advance notice is required before a reduction of a household's benefits may be accomplished. That exception, however, is not for "mass changes". Rather, it is for those situations in which the reduction or termination is "clearly require[d]" by a "written statement" from the household itself. Even in such cases, notice is still required, but it may be provided "as late as the date on which the action becomes effective". Pursuant to the principle of *expressio unius est exclusio alterius*, it must therefore be presumed that this listed exception to the general rule is the only one that Congress intended. *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 188 (1978).

The Secretary also hints that the term "notice of adverse action" as used in the statute should be read as a term of art cryptically incorporating regulations that included the "mass change" exception (Federal Brief at 21). This contention was also raised below and rejected by the First Circuit. It is as untenable as the first; both because it does not comport with the rest of the language of § 2020(e)(10) and because it is premised upon a misreading of the legislative history of that section.

In the absence of "extraneous relevant aids to construction", Congress is presumed to have intended words to mean what they normally convey. *Rosenman* v. *United States*, 323 U.S. 658, 661 (1945); *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 531 (1947). In the current case, it is clear that Congress was not using "adverse action" as a technical term. Before that term even appears, § 2020(e)(10) provides for the continuation of food stamp benefits to any household that timely requests a fair hearing after receiving "individual notice of agency action reducing or terminating its benefits". The sentence then goes on to provide that the household's benefits shall continue at the level "authorized immediately prior to the notice of adverse action" until such time as an "adverse decision" is rendered. From this it is apparent that the word "adverse" is being utilized in its normal fashion. When it first appears, in the term

"notice of adverse action", it is functioning as a shorthand reference back to the earlier phrase "notice of agency action reducing or terminating . . . benefits", which of course is an action adverse to a household. This internal analysis is confirmed by the imminent use of the word in the phrase "adverse decision", which clearly connotes nothing more than a decision contrary to the participant's claim. Thus, the very sentence in which the term "adverse action" appears provides the proof that "adverse" is used in its normal, every-day sense; not as a code word for the silent incorporation of an exception to the plain meaning of the statute.

Despite the language and structure of the Act, the Secretary implies that because Congress in 1977 legislated against the "backdrop" of regulations which contained "mass change" provisions, the notice and hearing language of § 2020(e)(10) should be read to have adopted those provisions by implication.[14] Federal Brief at 21-22. This suggestion suffers from two weaknesses. First, Congress has demonstrated in other sections of the Act that it knows how to incorporate the Secretary's regulations when it wishes to do so. Thus, in 7 U.S.C.

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[14] The Secretary suggests that "Congress adopted the 'adverse action' procedures" in 1971 in response to *Goldberg* v. *Kelly*. Federal Brief at 21. Actually, only the first clause of the current § 2020(e)(10), providing the opportunity for a hearing to contest any agency action affecting a household, was added in 1971. Pub. L. 91-671, § 6(b) (adding what was then codified at 7 U.S.C. (Supp. II 1970) § 2019(e)(6)). The second clause, containing the notice language and providing the explicit entitlement to unreduced benefits pending a hearing was added in 1977 well after the legislative history relied upon by the Secretary was written. (See text, *infra* at 26). Nonetheless, it does appear that Congress assumed in 1971 that by providing the right to a fair hearing it was implicitly mandating prior adequate notice as well. While there is scant contemporaneous legislative history surrounding the 1971 amendment, Senator Leahy in 1977 described the fair hearing requirements of the 1971 Act as follows:

> Prior notice of *any* intended reduction or termination in aid . . . must be given setting forth a brief statement of the *facts* and specific regulations relied upon for any proposed action, and insuring that aid shall continue unabated until a fair hearing decision is rendered. 123 Cong. Rec. 16344 (May 24, 1977) (debate on S.275, the Senate version of the Food Stamp Act of 1977) (emphasis added).

§ 2014(g), for example, Congress has provided that the "Secretary shall, [in determining rules for countable assets] follow the regulations in force as of June 1, 1982". No such intention to adopt wholesale the notice and hearing regulations in existence in 1977 is expressed in § 2020(e)(10), and, given Congress' demonstrated ability to achieve that result when desired, none should be implied. *F.T.C.* v. *Sun Oil Co.*, 371 U.S. 505, 514-515 (1963); *Fedorenko* v. *U.S.*, 449 U.S. 490, 512 (1981).

Further, the Fair Hearings section of H.R. Rep. 95-464, *supra* at 288-289 (1977), relied upon by the Secretary to support his hypothesis regarding the meaning and narrowing effect of the "adverse action" language in § 2020(e)(10), in fact offers scant guidance. That part of the Report was actually written a year earlier in conjunction with the House version of the proposed Food Stamp Act of 1976 (H.R. 13613). *See* H.R. Rep. 94-1460, 94th Cong., 2nd Sess. 266 (1976). Because the 1976 bill proposed to adopt unaltered the 1971 fair hearing provisions of the Act, it contained no mention of the language at issue here. The report written in support of that bill, therefore, sheds no light on the meaning of the then nonexistent notice language of § 2020(e)(10). The Fair Hearings section of the 1976 Report was utilized *verbatim* in conjunction with the Food Stamp Act of 1977, which itself contemplated no change in the 1971 fair hearings section until, at the last minute, the current notice language was added during committee mark-up. H.R. Rep. 95-464, *supra* at 860. In these circumstances, H.R. Rep. 95-464 (1977) can offer little support for the hidden meaning that the Secretary would impute to words that were not yet imagined when the Report was drafted.[15]

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[15] Indeed, as the Secretary notes (Federal Brief at 22 n.23), the House Agriculture Committee as early as 1976 expressed its difficulty with the application of the Secretary's "mass change" procedures to the "massive changes" contemplated by the Act of 1977. Those changes were no different in kind than those enacted by OBRA in 1981, one of which is at issue here. Yet the Committee specifically rejected the use of the "mass change" provisions there. It is not possible to reconstruct whether the Committee's uneasiness with the "mass change" aspects of the Secretary's regulations ultimately led to the current specific notice provisions in § 2020(e)(10), but certainly that expressed uneasiness does not, given subsequent events, offer any support for the Secretary's theory of implied acquiescence.

That the phrase "notice of adverse action" was not used as a technical term is confirmed by both the Senate and House Conference Reports following the reconciliation between their respective versions of the Food Stamp Act of 1977. Sen. Conf. Rep. 95-418, 95th Cong., 1st Sess. 197 (1977) and House Conf. Rep. 95-599, 95th Cong., 1st Sess. 197 (1977) both provide:

> The House amendment provides that—upon State agency notice of reduction or termination of its benefits during the certification period—any household that timely requests a fair hearing on such matter will continue to participate and receive benefits on the basis authorized immediately before notice of *the* adverse action until a fair hearing is completed and an adverse decision rendered, or until the current certification period expires, whichever occurs first. [emphasis added]

From the description of the provisions of the second clause in § 2020(e)(10), it is apparent that the statute contains no code words. Reference is first made to "agency notice of reduction or termination" of benefits, without any qualifiers. Then, it is explained that benefits will continue following a hearing request at the level authorized "immediately before notice of *the* adverse action". Thus, at least following reconciliation, the Food Stamp Act of 1977 contemplated notice and the opportunity to freeze one's benefits by requesting a hearing whenever a state agency sought to reduce or terminate a household's benefits. It could not have intended to utilize the phrase "notice of adverse action" as a term of art to limit those rights, for the Conference Reports do not even use that term. This contemporaneous legislative explanation of the 1977 amendment to § 2020(e)(10) dictates that the Secretary's suggestion that the statute should be read to contain a silent, wide-spread exception to its plain language must be rejected. *National Ass'n of Greeting Card Publishers* v. *U.S. Postal Service*, ___ U.S. ___, 103 S. Ct. 2717, 2731 n.28 (1983).

Thus, in light of the language, structure and legislative history of § 2020(e)(10), the First Circuit correctly concluded that it required advance notice of the reductions and terminations in this case. The only remaining issue then with regard to

the court's statutory holding is the question of the notice's content. The court of appeals found that the statute required notice that was sufficiently informative to allow a household to determine not only that it had a right to appeal, but whether or not there was any reason to exercise that right. This finding flows inexorably from the very purpose and structure of § 2020(e)(10) within the Food Stamp Act.

As previously discussed, Congress has not mandated that hearings be held whenever an agency wishes to take some action, only that they be available upon request. This allows the administrative process to function unimpeded in the vast majority of cases, but provides a household with the ability to challenge that process when it believes the agency is proceeding incorrectly with regard to its particular case. This conclusion is further supported by the second clause of § 2020(e)(10), which provides that in that subset of cases in which the proposed agency action is one of reduction or termination of benefits, the household may halt the proposed action and freeze its benefits at their prior level by requesting a hearing after receipt of "individual notice" of the proposed reduction. The only fair reading of the statute is that this provision contains the requirement for recipient-specific information found by the First Circuit.[16]

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[16] The term "individual notice" contained in 7 C.F.R. § 273.12(e)(2)(ii) first appeared in the Secretary's regulations in response to the amendments enacted by the Food Stamp Act of 1977, which contained the notice language now codified in the second clause of § 2020(e)(10). 43 Fed. Reg. 47846, 47915-47916 (October 17, 1978). While it appears that even then the Secretary sought to limit the advance notice requirements of § 2020(e)(10) by relegating the called-for "individual notice" to obscurity in a subsection of his newly restructured "mass change" regulations, he did seem to recognize that the notice would require recipient-specific information. Thus, § 273.12(e)(2)(ii) requires state agencies to continue benefits to a household that has requested an appeal "only if the issue being appealed is that food stamp eligibility or benefits were improperly computed." A household can not appeal on that basis, of course, unless it receives some indication of how its benefits were computed, so that it can ascertain whether it appears to have been done properly or not. It was upon this basis that both lower courts concluded that the December notice did not even comport with the minimal requirements of this regulation.

One of the definitions given for "individual" by Webster's Third New International Dictionary of the English Language, Unabridged (1971), at p. 1152, is:

> individual, adj.: 2C: intended for one person . . . *applying* to one person. (emp. added)

What makes a notice individual to a given household is the information regarding the specific effect a proposed action will have on that household. In the case at bar, for example, it may well be that the benefits of thousands of program participants were reduced, but the amount of reduction for each household, and its accuracy, were entirely dependent upon the amount of each individual household's earned income [PA 77-78; 23-24]. Thus, to have meaning in this case, the requisite "individual notice" had to include at least the amount of the proposed reduction to each household and the earned income figure upon which that reduction was premised. Without that information, there was simply no rational basis for limiting requested hearings, and undiminished benefits, to those cases in which it appeared that the proposed reduction was based on a factually incorrect premise.

It is this ability of the household to check the factual underpinnings of a proposed agency action that is the cornerstone of the error detection and correction system created by Congress in § 2020(e)(10). It is a system that is of a piece with other provisions in the Act that make the program's participants the primary source of the information upon which agency decisions are based. However, this entire review mechanism is short-circuited if the notices of proposed reductions or terminations provided to households are not sufficiently informative to allow participants to make a rational decision regarding whether or not to appeal. Even the legislative history cited by the Secretary supports this conclusion. He points out that the House Agriculture Committee, in discussing the implementation procedures to be utilized in conjuction with the "massive changes" contemplated by the Food Stamp Act of

1977[17], recognized that "hearings would, of course, be unnecessary in the absence of claims of factual error in individual benefit computation and calculation". H.R. Rep. 95-464, *supra* at 289. Federal Brief at 22 n.23. This recognition is important in two respects. First, it utterly refutes the Secretary's claim that Congress was unconcerned about individual errors resulting from "mass changes" in the way the program is defined or administered. Second, it establishes that Congress did indeed envision a system in which the fair hearing would address those cases in which "claims of factual error in individual benefit computation and calculation" were involved. It is difficult to fathom how such a claim of factual error can be made in good faith unless a household is provided with the factual basis of the proposed action and can compare that to what it knows (or even believes) to be correct.

Thus, the requirement of informative notice in the current case need not be inferred only from the assumed congresssional solicitude for fair procedure. Rather, it is reflected in the language, structure and legislative history of the Act in general and § 2020 (e)(10) in particular. It is indeed, as the First Circuit concluded, a matter of common sense that a statute that provides the right to request a hearing after receipt of advance notice of a proposed reduction in benefits, contemplates a notice that allows its recipient to do more than guess whether or not to exercise that right [PA 24; 94-95].

Consequently, the proper relief to be afforded the plaintiffs in this case must be determined within the context of the federal statutory violation found by the court of appeals; either because that aspect of the court's judgment has not been appealed or because it is plainly correct.

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[17] Or, more accurately, the proposed Food Stamp Act of 1976. See text, *supra* at 26.

POINT II

THE PROSPECTIVE INJUNCTIVE RELIEF AFFORDED BY THE DISTRICT COURT WAS APPROPRIATE

Despite affirming the district court's conclusion that the notice at issue was statutorily inadequate, the court of appeals nevertheless reversed the prospective injunctive relief designed to insure future compliance with the Act's provisions. This aspect of the First Circuit 's decision was based upon its belief that the Department had not acted in bad faith and would strive to provide adequate notice in the future [PA 37-38]. However, such action by a court of appeals runs counter to the consistent teachings of this Court regarding the breadth of a district court's equitable discretion and the correspondingly limited scope of appellate review. *U.S.* v. *W.T. Grant Co.*, 345 U.S. 629, 634 (1953); *Lemon* v. *Kurtzman*, 411 U.S. 192, 200 (1973).

"It is the historic purpose of equity to 'secur[e] complete justice' ". *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975), quoting *Brown* v. *Swann*, 10 Pet. 497, 503, 9 L.Ed. 508 (1836). In achieving that end in response to an established statutory violation, a trial court should exercise its discretion in light of the objectives of the act, the good faith of the parties, the likelihood of recurrence of the illegal conduct, and the convenience of, and possible injuries to, the parties flowing from the issuance of an injunction. *See Hecht Co.* v. *Bowles*, 321 U.S. 321, 325, 326, 328-330, 331 (1944). An examination of the record in this case demonstrates that the district court was cognizant of each of these factors in fashioning its relief, and that it was therefore a clear abuse of authority for the court of appeals to substitute its judgment for that of the trier of fact.

As demonstrated in Point I, there was no dispute between the lower courts regarding the objectives of the relevant provisions of the Food Stamp Act. Both found that § 2020(e)(10) not only envisioned, but required, advance informative notice of any proposed agency reductions or terminations of a household's benefit allotment; notice sufficient to allow a household

to determine whether or not it should exercise the right to appeal afforded by the statute. Thus, this is not a case in which the reviewing court determined that the lower court's exercise of its injunctive powers was limited by or inconsistent with the act sought to be enforced.

Indeed, it is difficult to imagine in what respect that could be true. Far from contravening the objectives of the notice and fair hearing procedures set forth in § 2020(e)(10), the district court merely effectuated them by instructing the Department to provide meaningful information in an understandable manner. In doing so, the judge carefully arrived at a "nice adjustment and reconciliation between the competing claims" of the parties. *Weinberger* v. *Barcelo-Romero*, 456 U.S. 305, 312 (1982). He made specific findings that administratively it was both feasible and beneficial for the Department to issue notices that complied with the requirements of the injunction [PA 75-77, 94-95; Findings 84-86, Conclusion 16]. He also found the interest of the plaintiffs in receiving meaningful notice to be substantial [PA 87-88, 95; Conclusions 6, 17]. After weighing these factors, the judge determined that prospective injunctive relief was appropriate to protect the plaintiff class.

Nevertheless, the relief entered was minimally intrusive. It prescribed only the minimum information necessary to insure that program participants would be able to fulfill their Congressionally-intended role as the primary source of error detection and redress in their individual cases. It did not purport to circumscribe the manner in which the agency might go about providing the requisite information, leaving that decision instead to the Department itself. In fact, if the order of the district court is remarkable in any respect, it is only for the amount of restraint exhibited in it. As the First Circuit itself noted, other courts, when faced with similar challenges to inadequate notices, have reacted by issuing far more restrictive mandates. *See e.g.*, *Banks* v. *Trainor*, 525 F.2d 837, 842 (7th Cir. 1975), cert. denied, 424 U.S. 978 (1976) (requiring a breakdown of income and deductions, factors relevant to determining net food stamp income, and a benefit chart in a

food stamp "mass change" situation) and *Dilda* v. *Quern*, 612 F.2d 1055 (7th Cir. 1980), cert. denied *sub nom.*, *Miller* v. *Dilda*, 447 U.S. 935 (1980)(requiring an agency worksheet to be sent in conjunction with changes in the Aid to Families with Dependent Children program). The trial court in this case, with regard to the content of future food stamp reduction notices, merely ordered the Department to provide sufficient information to give effect to § 2020(e)(10).

The Department was also instructed to establish standards for the form and comprehensibility of future notices. The court had before it uncontroverted expert testimony that the notice issued in this case was a "typographic abomination", exceeding by a wide margin virtually every typographic standard for legibility [JA 167-171]. The evidence further established that more than 80% of the plaintiff class had a high school education or less [PA 62, Findings 43-44; JA 127], and that public aassistance recipients who have a twelfth grade education or less most probably cannot read at more than an eighth grade level [JA 32, 112-114]. Based both upon the experience of the Social Security Administration in drafting Supplemental Security Income notices at a sixth grade reading level and expert testimony at trial, the district court concluded that it was administratively feasible for the Department to draft notices at a fifth-sixth grade level [PA 76, Finding 85]. Nevertheless, the judge did not draw upon this wealth of uncontradicted data to formulate a specific decree. Rather, still mindful of "the competing interests of the parties", the court, subject to its review, offered the Department the opportunity to devise its own administratively workable rules to protect against the future issuance of illegible and incomprehensible notices.[18]

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[18] Because of the district court's cautious approach to this aspect of the relief, there is at present still no substantive order regarding the readability of future notices. It is therefore difficult to understand how the court of appeals could have concluded that this section of the decree was unduly burdensome to the Department, for it specified no substantive obligations with which the Department had to comply. Absent a determination that the district court was totally precluded under any circumstances from issuing relief in this area, objection to this portion of the order is premature.

It is thus apparent that the district court's decision to issue injunctive relief was entirely consistent with the purposes of the Food Stamp Act. Moreover, the remedy chosen represented a careful balancing of the plaintiffs' need for future protection and the Department's desire for the widest possible latitude in conducting its affairs. Nonetheless, the First Circuit reversed the granting of the injunctions, relying upon two closely related findings: the absence of a finding that the defendant had acted in bad faith, and the belief that the Department would strive to do better in the future. Neither rationale for the court of appeals' conduct can withstand scrutiny.

Evaluation of the good faith *vel non* of a defendant and the likelihood of voluntary compliance in the future are "question[s] best addressed to the discretion of the trial court." *U.S.* v. *W. T. Grant Co.*, 345 U.S. at 634. Further, as this court has repeatedly noted, the absence of bad faith (or even the presence of good faith) "does not affect whether an injunction might be issued . . . by a court possessed of jurisdiction." *Pennhurst State School* v. *Halderman*, ___ U.S. ___, 104 S.Ct. 900, 912 n.17 (1984); *U.S.* v. *W. T. Grant Co.*, 345 U.S. at 633. This is especially true in suits against government officials, where a finding of "bad faith" may result in personal liability.[19] *See Wood* v. *Strickland*, 420 U.S. 308, 321-322 (1975); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 815-819 (1982). The facts of this case underscore the significance of this point. At the time the December notice was prepared and issued, this action was already pending. The Department was on notice of exactly what information plaintiffs considered essential to make the notice meaningful (*i.e.*, the household's old benefit level, new benefit level and earned income). Nevertheless it did not even bother to ask its computer programmers whether this information could be included on the December notice [PA 74-75, Finding 83]. As it turned out, if the Department had merely requested that this information be included, it could have been done without difficulty or delay [PA 75-76, Finding

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[19] The former Commissioner of the Department of Public Welfare was sued in his individual capacity in this action.

84]. Hence, while the district court concluded that the Commissioner's predecessor did not act with the requisite bad faith to subject him to personal liability, it was also aware that the Department had not responded in such a manner as to instill confidence in its commitment to the provision of adequate notice in the future.

Thus, by focusing on the formalistic absence or presence of bad faith in this case, the First Circuit lost sight of the fact that "the historic injunctive process was designed to deter, not to punish." *Hecht Co.* v. *Bowles*, 321 U.S. at 329. The relevant inquiry is properly focused on the likelihood of a future violation, whether intentional or not, because preventing such recurrences is "[t]he sole function of an action for injunction." *U.S.* v. *Oregon StateMedical Society*, 343 U.S. 326, 333 (1952). In the current case, the district court had before it evidence of the Department's unwillingness even to inquire about issuing an adequate notice in December. In addition, it was aware of the Department's self-confessed susceptibility to computer chaos when large scale changes in program operations are undertaken. Under these circumstances, the judge concluded that an injunctive remedy designed to insure future informative, comprehensible notices was necessary to keep tomorrow's illegal conduct from becoming yesterday's irremediable act. Thus, absence of bad faith on the part of the defendant was simply immaterial to the purpose of the relief afforded, and certainly constituted an inadquate basis for the First Circuit's reversal of that relief.

The second factor upon which the court of appeals relied in lifting the injunctions was its belief that "the state will strive to provide constitutional notice in the future" [PA 38]. Even were the First Circuit's faith justified,[20] it would not suffice to preclude the injunctive relief afforded by the district court. First, the appellate court's focus is again misplaced. In *Califano* v. *Yamasaki*, 442 U.S. at 705, the Court noted that an injunction against the Secretary of Health, Education and Welfare was

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[20] But see *supra* at 14 n.8.

appropriate to insure future compliance with an order that he provide pre-recoupment waiver hearings to Social Security recipients, even though his duty to comply was thereby enforceable by contempt and the likelihood that he would not voluntarily do so was deemed to be a "remote eventuality." This approach demonstrates what the First Circuit failed to consider. The issue is not whether the Department will strive to comply in the future, but rather what protection will be available to the plaintiffs should it fail to do so.

Further, this Court has often cautioned courts "to beware of efforts to defeat injunctive relief by protestations of repentance and reform." *U.S.* v. *Oregon State Medical Soc.*, 343 U.S. at 333; *Zenith Radio Corp* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 131 n.25 (1969); *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 25 n.13 (1978) (Stevens, J., dissenting). Here, of course, while the Department's attorneys suggest repentance, its interim conduct remains unreformed. Certainly the record is devoid of any assurance of future compliance. Thus the First Circuit's faith that the Department would try to do better in the future not only misses the conceptual mark, but is based upon unsubstantiated, and inappropriate, supposition.

Consequently, it can be seen that the district court entered injunctions that were carefully crafted to accommodate the needs of both the plaintiffs and the Department. The relief was no more intrusive than necessary to accomplish the objectives of 7 U.S.C. § 2020(e)(10), with which it was completely in harmony. That being the case, the district court's exercise of its remedial authority could only properly be reversed upon a "strong showing" of abuse of discretion. *U.S.* v. *W. T. Grant Co.*, 345 U.S. at 633. Unfortunately, the court of appeals appears to have lost sight in this case of its proper appellate function. Rather than applying the appropriate standards to ascertain whether the district court had indeed abused its discretion, the First Circuit seems to have viewed itself as a second trial court, free to substitute its remedial preferences for those of the first. However, the balanced approach demonstrated by the district court in this case should not be so lightly

reversed. Certainly to do so upon the surmise that the enjoined party will strive to do better in the future is completely inappropriate, for such an action substitutes the intuition of the appeals court for the hard weighing of facts, including the demeanors of the parties, undertaken by the trial court. Because the injunctive remedy fashioned by the district court fell well within the accepted bounds of equitable discretion, this Court should reverse the judgment of the First Circuit and reinstate the relief afforded to the plaintiffs following trial.

POINT III

THE DISTRICT COURT'S RESTORATION OF THE WRONGFULLY WITHHELD FOOD STAMP BENEFITS WAS ENTIRELY APPROPRIATE

In addition to the injunctive relief afforded the plaintiffs, the district court ordered the defendants to return to each household any benefits that had been withheld by the Department pursuant to the statutorily invalid notice of December 1981. Despite affirming that the December notice failed to provide the statutorily mandated "meaningful advance notice" [PA 29], the court of appeals reversed this relief as "unwarranted" because the plaintiffs had not proved that the underlying reductions were substantively incorrect [PA 33]. Plaintiffs contend that it is the First Circuit that erred, for the restoration of the wrongfully withheld benefits was indeed warranted; both as a proper execution of the command of Congress found in 7 U.S.C. § 2023(b) and as a proper exercise of the district court's discretion.

A. Restoration Of The Food Stamp Benefits Reduced Or Terminated In Violation Of § 2020(e)(10) Is Mandated By § 2023(b)

The propriety of restoring the food stamp benefits withheld pursuant to the invalid notice flows from the language of the statute that the Department violated. Both lower courts held that the December notice had not comported with the requirements of 7 U.S.C. § 2020(e)(10), and had thereby deprived

each affected household, in the words of the First Circuit, of its statutorily mandated "opportunity for review of the Department's calculations" underlying the proposed reductions or terminations [PA 37]. Nevertheless, the court of appeals appears to have concluded that if the underlying reductions or terminations were substantively correct, the fact that they were accomplished in violation of statutorily required procedures did not render them wrongful. Such a conclusion is incorrect both because it misperceives the nature of the entitlement afforded to program participants by § 2020(e)(10) and because it conflicts with a long line of decisions from this Court.

When Congress enacted the provisions of § 2020(e)(10), it obviously understood that it was creating a system in which most households would receive, for a time, benefits at a level that is substantively incorrect. This happens, or should happen, for example, each time an agency correctly proposes to reduce or terminate a participant's grant and gives the requisite advance notice of the proposed action. For the ten or more days between the mailing of the notice and the effectuation of the change, participants, even without appealing, receive more food stamps than that to which they are then substantively entitled. 7 C.F.R. § 273.13(a)(1).[21] Of course, if a household does appeal a proposed action, its benefits are frozen at the level "authorized immediately prior to the notice" until the hearing is held and an adverse decision is rendered. 7 U.S.C. § 2020(e)(10). The benefits mandated during both of these periods are not paid because Congress felt they would normally be substantively correct, but rather because it decided that, in a need-based program, it was better temporarily to pay a potentially incorrect amount of benefits than precipitously to alter a household's allotment before offering it

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[21] This fact initially concerned some state agencies who were afraid that such payments would be considered overissuances. The Secretary reassured them, stating, "This is not the case because the advance notice requirement actually extends eligibility for this [then] 15-day period time (sic)." 36 Fed. Reg. 20146 (October 16, 1971).

a meaningful opportunity to challenge the factual assumptions underlying the proposed action.

Within this Congressional scheme, as both lower courts found, adequate notice is a necessary condition precedent, the very trigger, to a meaningful opportunity to exercise the right to request a fair hearing. *See Cole* v. *Young*, 351 U.S. 536, 551 (1956). While recognizing that the December notice had deprived its recipients of the required meaningful opportunity to contest, the court of appeals failed to realize that the Department had also thereby deprived those households of their substantive entitlement to receive their prior level of benefits until they were afforded that opportunity. Through the provisions of § 2020(e)(10), Congress has specifically indicated that it is prepared to pay for the procedural protections that it has mandated. It has stated that a household faced with a reduction or termination of its benefits is entitled to continued participation in the program at an undiminished level until it has been given a meaningful chance to contest the proposed action. Having determined that the plaintiffs were not given that opportunity, the First Circuit was not free to disregard their Congressionally-mandated entitlement to their prior level of benefits.

Even if one were to ignore the substantive entitlement granted by § 2020(e)(10), the action of the court of appeals could not be upheld in light of the provisions of 7 U.S.C. § 2023(b). There, Congress has provided that:

> In any judicial action arising under this chapter, any food stamp *allotments* found to have been *wrongfully withheld shall be restored* only for periods of not more than one year prior to the date of the commencement of such action, . . . (emphasis added)

As discussed above, the First Circuit found that all of the plaintiffs' benefits had been reduced or terminated without the notice required by 7 U.S.C. § 2020(e)(10) and 7 C.F.R. § 273.12(e)(2)(ii). Hence, even if one were to view the provisions of those sections as being purely procedural, the inquiry would still remain whether benefits withheld in violation of the

procedural protections provided by the Act and its implementing regulations are "wrongfully withheld" within the purview of § 2023(b). If so, then the return of those benefits is mandated. This inquiry in turn raises two questions. First, were benefits "withheld" from the plaintiffs within the meaning of the Act? Second, were they "wrongfully" withheld? Pursuant to the plain meaning of the words involved and a long line of cases from this Court the answer to both of these questions, and therefore the inquiry, is unequivocably yes.

Webster's Third New International Dictionary of the English Language, Unabridged (1971), at 2627, defines "withheld," in relevant part, as:

> 2: to desist or refrain from granting, giving, or allowing: keep in one's possession or control: keep back.

From this definition it can be seen that the very word "withheld" fairly contemplates a process more than a judgment about the ultimate result of that process. *See U.S.* v. *Dumas*, 149 U.S. 278, 284 (1893). If one desists[22] from granting a benefit that another has been receiving, he has withheld that benefit. There is thus little doubt that a withholding occurred in the present case. Each of the plaintiffs was receiving a given food stamp allotment prior to the Department's action in December, 1981. Following that action, each household began receiving a lesser amount of benefits. The Department had obviously withheld the difference between those two amounts; not only within the understanding of Mr. Webster, but also within that of Congress, for the latter gave each program participant the right to challenge every such action undertaken by a state agency. 7 U.S.C. § 2020(e)(10).

Given that food stamps were withheld by the Department, the only remaining question is whether those allotments were "wrongfully" withheld because the action was accomplished in violation of the procedures set forth by Congress in 7 U.S.C.

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[22] The word "desist" itself primarily connotes the discontinuance of an ongoing activity. Webster's Third New International Dictionary at 612.

§ 2020(e)(10). The First Circuit answered this question in the negative, but the relevant case law indicates that its answer was incorrect.

The "disregard of the command of the statute is a wrongful act . . ." *Texas & Pacific R. Co.* v. *Rigsby*, 241 U.S. 33, 39 (1916). Agency action "in the teeth" of a statutory or regulatory provision is "lawless". *Estep* v. *U.S.*, 327 U.S. 114, 121 (1946). These general maxims are no less true when the rights violated are procedural rather than substantive, especially where the procedure is "mandated by the Constitution or federal law." *U.S.* v. *Caceres*, 440 U.S. 741, 749 (1979).

Even when an agency has achieved unquestionably permissible or "correct" results, this Court has consistently declared such actions to be wrongful[23] if they were accomplished in violation of published procedural safeguards designed to protect "the rights of individuals." *Morton* v. *Ruiz*, 415 U.S. 199, 235 (1974); *U.S. ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 268 (1954); *Service* v. *Dulles*, 354 U.S. 363, 373, 388 (1957); *Vitarelli* v. *Seaton*, 359 U.S. 535, 540, 545 (1959); *see also Yellin* v. *U.S.*, 374 U.S. 109, 121 (1963)(same result where rules were those of a Congressional subcommittee). While this line of cases will be discussed more fully in point III-B, *infra*, with regard to the inherent authority of the courts to remedy

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[23] Black's Law Dictionary, Fifth Edition (1979) at 1446, defines "wrongful" as:

> *In a wrong manner;* unjustly, in a manner contrary to the moral law, or to justice. (Emphasis added).

This surely encompasses how something is accomplished, as well as the underlying result achieved.

Webster's Third New International Dictionary, at 2642, is somewhat less direct regarding the meaning of "wrongful", although it does list UNLAWFUL as part of the definition. "Unlawful" is then defined in Webster's at 2502 as:

> 2: . . . disobeying or disregarding the law 3: contrary to normal or acceptable procedure.

The only procedure acceptable in this case, of course, is that mandated by Congress.

such procedurally defective actions, they are cited here merely for the unremarkable, common-sense proposition that actions taken in violation of federal statutory and regulatory procedural requirements are "wrongful".

This Court's decision in *Sampson* v. *Murray*, 415 U.S. 61 (1974), is particularly instructive in this regard. There, the plaintiff, a federal probationary employee with absolutely no claim that she had a substantive right to maintain her job, nonetheless alleged that she had been discharged without being afforded the proper civil service notice. She sought and was granted a temporary restraining order to prevent her discharge. Upon appeal this Court reversed. Noting that the Back Pay Act, 5 U.S.C. § 5596(b), provided restitution when a federal employee was found "to have undergone an unjustified or unwarranted personnel action", the Court concluded that the plaintiff had not demonstrated irreparable injury, for her loss of salary would be remedied if she ultimately prevailed on her claim that she had been discharged without the required notice. This conclusion was reached despite the fact that the plaintiff in *Sampson* did not even contend that if a factual mistake was discovered at her hearing she would then have a right to her job. Rather, as the Court recognized:

> Respondent's claim here is not that she could not as a matter of statutory or administrative right be discharged, but only that she was entitled to additional procedural safeguards in effectuating the discharge. *Sampson*, 415 U.S. at 91.

Thus, the Court's action in *Sampson* establishes two points relevant to the current case. First, purely procedural violations may constitute "unjustified or unwarranted" action. Second, when a statute provides for the restoration of benefits lost pursuant to such agency action, violations of procedural rights, as much as substantive rights, trigger the mandated restitution.

Nor is there any reason why the word "wrongfully" in § 2023(b) should be read any more narrowly than those in the Back Pay Act. There is absolutely nothing to indicate that

when Congress referred to "wrongfully withheld" benefits, it meant to distinguish, *sub silentio*, between those provisions of the Act that provide substantive and procedural rights. Rather, there is every reason to conclude that the term "wrongfully" retains its normal definition, for in § 2020(e)(10) Congress has demonstrated its willingness to pay for the procedures that it considers necessary to protect individual participants from the inevitability of agency errors. In this context, it would stand the plain language rule of statutory construction on its head to find that the same Congress that provided households with the procedural protections of § 2020(e)(10) nonetheless did not intend their violation by state agencies to be "wrongful." Both common sense and the cases just cited argue strongly against such a conclusion.

Consequently, food stamp benefits withheld in contravention of 7 U.S.C. § 2020(e)(10) and 7 C.F.R. § 273.12(e)(2)(ii) are "wrongfully withheld" within the meaning of § 2023(b). Because the language of the latter section is mandatory regarding the restoration of such benefits, the district court was entirely correct to order that remedy. That the relief was limited to the period of each household's existing certification or continued eligibility, whichever proved shorter, demonstrates that the district court was well aware of the overall scheme established in § 2020(e)(10). The remedy provided was thus exactly what was envisioned by Congress in § 2023(b). Correspondingly, it was a clear error for the court of appeals to reverse that relief based upon its belief that only those whose benefits were actually miscalculated, as determined by an after-the-fact reckoning, were entitled to the protections of the Act. Because Congress decided otherwise, the judgment of the First Circuit should be reversed and the relief afforded by the district court reinstated.

B. Restoration Of The Food Stamp Benefits Reduced Or Terminated In Violation Of 7 U.S.C. § 2020(e)(10) Was Well Within The District Court's Equitable Discretion

Even in the absence of the remedial language found in 7 U.S.C. § 2023(b), it was an entirely appropriate exercise of the

district court's discretion to restore the benefits that had been withheld in contravention of 7 U.S.C. § 2020(e)(10) and 7 C.F.R. § 273.12(e)(2)(ii). Restitution has always been an available arrow in an equity court's remedial quiver, expecially where, as here, its use furthers the purposes of a Congressional enactment. *Porter* v. *Warner Holding Co*, 328 U.S. 395, 399-400 (1946); *Albermarle Paper Co.* v. *Moody*, 422 U.S. at 417. Section 2023(b) did not create the judicial power to restore food stamp benefits that have been wrongfully withheld. It merely imposed a durational limitation upon an already existing remedy;[24] one that had been previously utilized in so-called "mass change" situations to effectuate the prior adequate notice requirements found in the Food Stamp Act and its regulations. *Banks* v. *Trainor*, 525 F.2d at 840; *Willis* v. *Lascaris*, 499 F. Supp. 749, 760 (N.D.N.Y. 1980).

The rationale for the judicial restoration of wrongfully withheld benefits lies in the need to enforce the provisions of § 2020(e)(10). *Mitchell* v. *Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). Both lower courts found that each plaintiff household had its benefits reduced or terminated without being afforded the requisite opportunity to contest. Because § 2020(e)(10) prohibits exactly this conduct by state agencies, restoration of the benefits withheld pursuant to the illegal conduct was not only appropriate, but necessary to give the section meaning. Until households have been given notice affording them a meaningful opportunity to contest a proposed

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[24] The legislative history surrounding the passage of the Food Stamp Act of 1977, Pub. L. 95-113, demonstrates that Congress was aware of and explicitly endorsed judicial actions awarding retroactive benefits to households whose allotments had been incorrectly reduced or terminated. H.R. Rep. No. 95-464, *supra* at 283-284. This view is further confirmed by the legislative history surrounding the 1981 amendments to the Food Stamp Act. The Report of the House Committee on Agriculture, H.R. Rep. No. 97-106, 97th Cong., 1st Sess., 148-149 (1981), in discussing the provisions relating to restoration of lost benefits stated:

> Currently, the Act requires the Department to restore in food stamps any household benefits which the State agency has wrongfully denied or terminated.

reduction or termination of their food stamps, Congress has assured them of undiminished allotments, whether or not that level of benefits ultimately proves to be substantively correct. Once violated, this statutory promise can only be enforced by restoring the *status quo* existent before the Department's unlawful action, and that is exactly what § 2023(b) requires. Congress clearly intended to restore benefits in this situation not only out of a sense of fair play, but also, and perhaps more importantly, to assure program participants that it was worth their while to bring illegal conduct to the attention of the agency and the courts. *Cf. Mitchell* v. *Robert De Mario Jewelry*, 361 U.S. at 292-293. Without this remedy, households have no incentive to do so, and are left to meekly suffer unauthorized agency conduct. In the current case, in fact, Mr. Parker's wife discouraged him from pursuing his complaint because she already believed that the Department would ultimately do what it wanted, whether or not the action was legal [JA 140]. It is just this fatalistic mentality that will be encouraged if benefits that were admittedly withheld illegally are nonetheless not returned. Given the Food Stamp Program's heavy reliance on the willingness of its participants to cooperate in good faith, Congress obviously recognized the importance of preventing the perception that the program's rules only apply to households, not to the administering agencies. For if such a perception becomes widespread, it is ultimately the integrity of the program itself that will suffer most.

This Court has often recognized that restoration of the *status quo ante* represents appropriate relief when the conduct of a government agency has been determined to have violated procedural requirements. In *U.S. ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), the Court voided the denial of an alien's application for suspension of deportation because the Board of Immigration Appeals had not accorded him the impartial hearing dictated by the Attorney General's regulations. In doing so, the Court did not find that the alien was entitled to suspension of deportation, only that he was entitled to the protection of the relevant regulations governing the making of

that determination before it could be denied. Similarly, in *Vitarelli* v. *Seaton*, 359 U.S 535 (1959), a government employee with no substantive right to his job was nonetheless reinstated because he had been discharged in violation of the applicable Department of Interior regulations. The Court was careful to note however that Mr. Vitarelli could again be discharged at any time following his reinstatement, pursuant to "any lawful exercise of the Secretary's authority." *Vitarelli*, 359 U.S. at 546; *see also*, *Service* v. *Dulles*, 354 U.S. 363 (1957). Hence, this Court has not hesitated to breathe life into statutory and regulatory procedural protections through the use of restitution.

Nor in the context of the current case does it exalt form over substance to restore the benefits withheld in violation of 7 U.S.C. § 2020(e)(10). The Food Stamp Act in general, and § 2020(e)(10) in particular, provide participants with both substantive and procedural rights. The provisions of § 2020(e)(10) were in existence when Congress enacted the program amendments contained in the Omnibus Budget Reconciliation Act of 1981. Nothing in the 1981 amendments indicates that Congress intended to repeal or temporarily suspend the requirements of § 2020(e)(10). Nor does anything in the latter section indicate that Congress contemplated that it would not apply to reductions or terminations undertaken by state agencies at its request. While OBRA certainly evinced an intent to reduce program expenditures, it cannot be read to have sanctioned a wholesale disregard of existing procedures for implementing those reductions. *See Levesque* v. *Block*, 723 F.2d 175, 184-85 (1st Cir. 1983). Thus, the district court was faced with the task of giving meaning to multiple provisions of the Food Stamp Act. Had the court not ordered the restoration of benefits reduced or terminated in violation of § 2020(e)(10), it would have subjugated that section of the Act to others containing only substantive rights. But it is a basic tenet of statutory construction that the provisions of an act are to be read together, affording to each its meaning and rendering none

superfluous. *U.S.* v. *Menasche*, 348 U.S 528, 538-539 (1955).[25] Only by acting as it did could the district court completely respect the stated will of Congress, giving effect both to *what* it wished done and *how* it wished that to be accomplished.

Consequently, the district court acted correctly in returning the food stamp benefits withheld in violation of § 2020(e)(10). Whether viewed as the execution of the command of § 2023(b) or as the appropriate exercise of equitable discretion, restitution in this case fully effectuated the goals of Congress. Thus because the district court acted well within the bounds of its remedial authority, it was an error for the First Circuit to reverse the restoration of the wrongfully withheld benefits. *Weinberger* v. *Barcelo-Romero*, 456 U.S. at 320.

POINT IV

THE DECEMBER NOTICE FAILED TO AFFORD PARTICIPANTS THE PROCESS THEY WERE DUE

A. Plaintiffs Possessed A Property Interest Subject To Protection Under The Due Process Clause

This is not a case in which the plaintiffs have challenged the authority of Congress to decrease the amount of the earned income disregard that they had been receiving.[26] Neither is it a case in which any individual household is claiming that, because of its peculiar circumstances or hardships, it is unfair or unwise to apply the decreased earned income disregard to its earned income. This is simply a case in which each household has claimed the right to demonstrate that the amount or fact of

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[25] The Court there stated:

> It is our duty "to give effect if possible, to every clause and word of a statute" [citation omitted], rather than to emasculate an entire section, as the Government's interpretation requires.

[26] Were this the case, the arguments and cases relied upon by the Secretary in his brief at 19-21, would have some relevance. But because the plaintiffs seek only to have the admittedly valid change in the program applied correctly to their individual cases, the cases cited in support of the Secretary's contention are simply inapplicable here.

the specific proposed reduction in its individual case may have been premised upon "incorrect or misleading factual premises or on misapplication of rules or policies to the facts" of its case. *Goldberg* v. *Kelly*, 397 U.S. 254, 268 (1970).[27] Thus, despite the Secretary's protestations to the contrary, this case is in fact controlled by the decision in *Goldberg*. There, in discussing the rights to timely and adequate notice and the opportunity to defend, the Court's full statement was that:

> These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.[15]
>
> [15]This case presents no question requiring our determination whether due process requires only an opportunity for written submission, or an opportunity both for written submission and oral argument, where the application of the rule of law is not intertwined with factual issues. [Citation omitted] 397 U.S. at 268.

From the above it is obvious that *Goldberg* was not limited only to cases in which benefits were reduced or terminated solely because of a perceived recipient-specific change in factual circumstances. Rather, it contemplated as well situations where reductions might be challenged due to "the misapplication of rules or policies to the facts of particular cases."[28] Such situations are much more likely to occur following changes in the law, due both to the agency's unfamiliarity with the new rules and the confusion which ensues during times of massive changes in program policy (see *supra* at 4-5 n.3). Nothing in

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[27] As both lower courts found, there was a high probability that the Department applied the new earned income disregard to the wrong amount of earned income for many of the households in the plaintiff class [PA 79, Finding 95]. Also, as the record proves, at least some members of the class were terminated from the program even though the Department was aware that they had absolutely no earned income to recalculate [JA 44].

[28] Indeed, footnote 15 implies that notice and at least some type of opportunity to contest are necessary even where the application of the rule of law implicates no factual issues.

Goldberg suggests that fewer procedural protections should be accorded when the benefits of many individuals are simultaneously in jeopardy.

The Secretary's effort to dismiss the need for notice because the Department was merely applying a new program policy to its existing data files obscures the real issue in this case. Shortly after *Goldberg* was decided, this Court summarily affirmed a three-judge court decision which rejected just such an argument. *Yee-Litt* v. *Richardson*, 353 F. Supp. 996, 1000 (N.D. Cal. 1973), aff'd, 412 U.S. 924 (1973). There, after reviewing a state agency's attempts to implement a "mass change" involving an adjustment in the treatment of non-exempt income, the court recognized that the critical issue was whether recipient-specific factual disputes could arise in the context of implementing the new policy. If so, it held, *Goldberg* applied and pre-termination hearings were required, no matter how many individual families might be affected by the policy change.

Consequently, at least where there is the potential that a factual mistake may have resulted in an incorrect reduction or termination of a need-based benefit, *Goldberg* found that the underlying statute afforded participants a legally protected expectation. *Board of Regents* v. *Roth*, 408 U.S 564, 577 (1972). The property interest at stake is not, as the Secretary mischaracterizes it, the right to the continued receipt of any given amount of benefits, but rather the right to the receipt of the correct amount of benefits. The Court in *Goldberg* did not find that the agency intended to make errors; only that they nonetheless occurred. Since the individual victims of those errors could not be identified in advance, it was determined that all program participants must be given adequate prior notice and an opportunity to be heard before their need-based benefits could be reduced.[29]

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[29] The entitlement which the *Goldberg* court found to be implicit in the AFDC statute (42 U.S.C. § 602 *et seq.*) is explicitly provided by the Food Stamp Act at 7 U.S.C. § 2020(e)(10).

Despite the fact that the implementation of the earned income disregard by the Department resulted in incorrect terminations and reductions, the Secretary argues that no process is due in this case.[30] If this contention were correct, then not only is no notice required, but neither is a hearing, whether before or after the reduction or termination. Thus, the Secretary would have this Court hold that the family identified in the record [JA 44] that had no earned income but was nonetheless terminated from the program has no right to bring that obvious error to the Department's attention. In his view, they have two alternatives; either reapply for the program (and thereby sacrifice the benefits already incorrectly withheld without any notice) or petition Congress for the redress of their greivance.[31] This draconian attitude finds no support in the case law.

While the right to notice and a hearing cannot and does not prevent administrative errors from occurring[32], it does provide

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[30] Cases cited by the federal respondent for this proposition are unhelpful. *Ohio State Consumer Ed. Ass'n* v. *Schweiker*, 541 F. Supp. 915 (S.D. Ohio 1982), was reversed on appeal and remanded for issuance of a new notice. *Ohio State Consumers Ed. Ass'n* v. *Schweiker*, No. 82-2111 (6th Cir. 3/26/82) (unpublished opinion). *Benton* v. *Rhodes*, 586 F.2d 1 (6th Cir. 1978), cert. denied, 440 U.S. 973 (1979), and *Seniors United for Action* v. *Ray*, 529 F. Supp. 55 (N.D. Iowa 1981) both found that a state could prospectively discontinue certain optional medical services it had previously chosen to provide recipients of Medicaid without affording them hearings prior to removing those services from the regulations. These decisions were based on the fact that no one was actually receiving, or had even applied for, the medical services that were being deleted from future coverage. Finally, the court in *Merriweather* v. *Burson*, 325 F. Supp. 709, 711 (N.D. Ga. 1970), aff'd in relevant part, 439 F.2d 1092 (5th Cir. 1971), in fact required the provision of advance notice and a hearing where the proposed reductions were premised upon individual factual predicates.

[31] The prospect of millions of food stamp households seeking individual Congressional redress every time a duly enacted provision of the Food Stamp Program is misapplied in their cases is truly extraordinary. It is nonetheless what the Secretary suggests. Federal Brief at 20.

[32] While acknowledging this rather self-evident proposition, *Mackey* v. *Montrym*, 443 U.S. 1, 13 (1979), recognized that "a primary function of legal process is to minimize the risk of erroneous decisions." Thus while a pre-

the victims of those errors with the opportunity to detect them and seek to have them corrected. That opportunity was all plaintiffs sought in this case and it is all they were afforded below. Due process requires no less.

B. The Notice Did Not Contain The Necessary Information

The amount of process due in any given case is defined by the demands of the particular situation. *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). The December notice did not state whether a recipient's food stamps were to be terminated or reduced [PA 71, Finding 73]. It did not state the amount of any reduction, nor did it tell anyone what his or her benefits would be following the change [PA 70, Findings 69 and 70]. It did state that the proposed termination or reduction was based on a different way of counting a family's earned income, but did not list the amount of earned income that the Department used in calculating the proposed change [PA 70, Finding 71]. The composition, language and printing of the notice were so difficult that it was incomprehensible to many, if not most, of its recipients [PA 96-97, Conclusion 20; PA 100, ¶ 1.c; JA 201-202].

In *Mathews* v. *Eldridge*, 424 U.S. 319, 334-335 (1976), this Court identified several factors that must be evaluated in determining what procedures are constitutionally mandated.[33]

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deprivation hearing may not always be mandated, no case supports the proposition that pre-deprivation notice is not required, at least where the deprivation may be anticipated. *Compare Parratt* v. *Taylor*, 451 U.S. 527, 543 (1981) with *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 435-436 (1982).

[33] The Department raises a red herring by contending that it was error for the First Circuit to utilize the *Eldridge* analytical framework in a notice case. In *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-314 (1950), the Court specifically noted the need to balance the interest of the individuals affected against those of the State while keeping in mind the value of additional procedure safeguards. Thus, *Eldridge* merely reflects a further refinement of the general analytical construct earlier identified in *Mullane*. To suggest that, because *Eldridge* was a hearing case, its analysis is not applicable here "erects an artificial barrier between the notice and hearing components of the constitutional guarantee of due process." *Memphis Light, Gas and Water Div.* v. *Craft*, 436 U.S. 1, 15 n.15 (1978).

Application of the balancing test described there to the facts found in this action dictates but one result: the December notice was woefully inadequate.

The first part of the *Eldridge* test requires evaluation of the private interest at stake. Both courts below found the plaintiffs' interest in receipt of the correct amount of food stamp benefits to be extremely significant [PA 87-88, Conclusion 6]. Neither defendant contests this determination.[34]

The next prong of the test requires evaluation of two factors: "the risk of an erroneous deprivation through the procedures used and the probable value . . . of additional . . . safeguards." The district court found that "the risk of erroneous deprivation is high with the probable value of additional procedures great" [PA 95, Conclusion 17]. Consequently, the defendants come to this Court arguing not that the court below committed an error of law, but that it incorrectly evaluated the facts. As it has done so many times before, this Court should decline the invitation to retry the case on appeal. *Rogers* v. *Lodge*, 458 U.S. 613, 622-623 (1982); *Blau* v. *Lehman*, 368 U.S. 403, 408-409 (1962); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

The district court's ultimate finding that the risk of error was substantial is based upon twenty-three subsidiary findings [PA 77-84, Findings 88-110]. The court explained that the

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[34] The Secretary, however, could not resist the temptation to qualify his concession. Federal Brief at 36 n.32. Contrary to his contention, the earned income disregard does not constitute an addition to benefits. It merely represents a way of estimating the actual take-home pay of an employed participant, thus removing the disincentive to work which would otherwise result. *See* H.R. Rep. 95-464, *supra* at 61. Indeed, the Act itself limits participation in the program to those households whose incomes and resources are found to be "a *substantial* limiting factor in permitting them to obtain a more nutritious diet." 7 U.S.C. § 2014(a)(emphasis added). It is this need-based nature of the food stamp program which renders the reductions and terminations at issue here more significant than those at issue in *Eldridge*, for here there was no fall-back program to which affected households could turn.

following factors all contributed to its conclusion regarding the high risk of error: the admitted confusion in the Department and its computer component (B.S.O.) during the latter part of 1981; the substantial data entry backlog which plagued the Department from October through December of 1981; the programming errors identified in the random sample of the 902C Report; and the December notice's total lack of meaningful information, which made it impossible for affected household's to detect and correct possible errors [PA 89-91, Conclusions 9-11]. The defendants maintain that neither the data entry backlog nor the errors identified in the random sample are relevant to the risk of error. Both contentions are wholly without merit.

The defendants do not contend that the data entry backlog did not exist. They argue instead that the existence of incorrect data in recipients' files had no effect on the accuracy of the reductions or terminations flowing from the change in the earned income disregard. However, as the district court explicitly found, "The specific earned income of a given household was a factor in determining the *amount* of that household's benefit reductions . . ." (emphasis added) [PA 77-78, Finding 90]. The court understood that if the earned income figure was wrong, the amount of the actual reduction due to the application of the new earned income disregard would also be wrong. It is for this reason that both the district court and the court of appeals found that the substantial data entry backlog contributed to the high risk of error.[35]

Indeed, it is a strange argument that less process is due where, as here, the agency is "merely" compounding an exist-

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[35] The courts below were clearly focusing only upon the accuracy of the actual amount of the reduction rather than any pre-existing benefit level error. This is convincingly demonstrated by the fact that the only required information found to be missing from the December notice was the amount of the benefit reduction and the amount of earned income to which the new disregard was applied [PA 100, ¶ 1(a); 26-27]. The earned income amount is the only recipient-specific bit of data relevant to the *accuracy of the specific reduction*, as opposed to the overall accuracy of the benefit allotment.

ing error. This is especially true where the Department has itself caused the data base error by failing to do what it was required to do with information already reported by households. It is, in fact, the height of audacity to allege that less notice is due in the current case, when the Department knew in advance that it had a substantial data entry backlog, that the B.S.O. was severely understaffed and that the computer programming necessary to implement this change was complex [JA 221-223]. In such error-prone circumstances, due process certainly does not condone a wholly uninformative notice.

The defendants' attack upon the results of the random sampling is equally unavailing. First it is urged that, because the random sample included seventeen pages from a different report[36], the study is rendered useless. Federal Brief at 30. Nothing could be farther from the truth. Those seventeen pages contained 370 cases, not one of which suffered an erroneous reduction or termination of benefits. If those pages are deleted, the minimum programming error rate detected by the study actually increases from 4.2% to 4.5%.[37] Thus, this "error" merely enhances the lower courts' conclusions.[38]

The defendants next assert that all of the households identified in the random sampling were also affected by a detected error in the treatment of the $10.00 minimum benefit, and therefore suffered no loss. This contention is clearly refuted by

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[36] It should be noted that the Department provided plaintiffs with the copy of the 902C report upon which the random sample was conducted. Any error in the contents of the report is due to the Department's negligence in producing the voluminous document.

[37] It is important to realize that either of these figures is more than twice as high as the defendants claim is normal in the overall operation of the program [PA 77, Finding 88]. Since all parties seem to agree that *Goldberg* was concerned at least with those cases in which the agency seemed prone to making errors, it is illogical at best to argue that the decision should not apply to a situation in which the *minimum* detected error rate is over twice as high as in those situations to which everyone agrees it does apply.

[38] This is because the number of detected improper reductions remains constant at 211 while the sample size decreases from 5013 to 4643.

the record. This additional programming flaw reduced below the $10.00 minimum the actual issuance of food stamp benefits (ATP's) to one and two person households [JA 49]. However, because the minimum benefit was only available to households which remained eligible for some allotment, terminated households could not have been affected by it. 7 C.F.R. § 273.10(e)(ii)(C). But of the two households with no earned income shown on the sample page of the 902C Report [JA 44], only one suffered a reduction of benefits. That family might have been affected by the minimum benefit error.[39] The other household, though, was terminated and therefore unentitled to any minimum benefit. Moreover, a further review of the sample page uncovers a third household, not identified in the random sample because it had earned income, whose benefits were reduced below ten dollars. Because of the $10.00 minimum benefit rule, this reduction, too, was apparently erroneous.

This additional class of programming errors confirms what plaintiffs have always maintained and what the district court recognized: the random sample identified only those programming errors which logically flowed from the nature of the change (*i.e.*, reductions or terminations of families with no earned income) and therefore established only the *minimum* programming error rate [PA 82, Finding 105]. The existence of additional programming mistakes and the undetectable data base flaws underscore the conservative nature of the district court's evaluation of the risk of error.

Thus, the defendants' efforts to insulate these actions from the dictates of due process because they were implemented by computers can not be justified. In *Memphis Light, Gas and Water Div.* v. *Craft*, 436 U.S. 1, 18 (1978), this Court took judicial notice of the fact that "the risk of an erroneous depriva-

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[39] There is not one shred of evidence in the record to establish that, in actual fact, even one of the 211 households identified in the random sample ever had its erroneous reduction corrected. Because such evidence, if it existed, was within the Department's possession, their failure to introduce it creates the negative inference that it did not exist.

tion, given the necessary reliance on computers, is not insubstantial." This record bears testament to the wisdom of that conclusion, for it establishes that here, at least, computerization only compounded the Department's woes.

The second factor to be considered in assessing the need for additional procedural safeguards is the degree to which such added protection will in fact have some value. Here the district court had the benefit of evidence that is not normally available to a court in reaching its conclusion. The unchallenged testimony of Dr. Mark Bendick, a world-renowned expert on the administration of public assistance programs (with a subspeciality in error and fraud prevention), was that errors could have been detected and avoided in the main through the simple expedient of telling the affected households the amount of their prior benefit, the amount of their new benefit, and the amount of earned income upon which the Department calculated the reduction [JA 95-96].

The district court found that without this information recipients could not even discover any mistakes, much less attempt to have them corrected [PA 70-71, Finding 72]. Based on the above, and in accord with numerous other courts that have considered the issue, both courts below reached the obvious conclusion: the provision of a notice with sufficient information to allow its recipient to determine if a mistake has been made is a valuable safeguard in assuring that such mistakes do not go undetected and thus uncorrected [PA 24, 91, 94-95]. *See e.g.*, *Gray Panthers* v. *Schweiker*, 652 F.2d 146, 172 n.55 (D.C. Cir. 1980); *Philadelphia W.R.O.* v. *O'Bannon*, 525 F. Supp. 1055, 1060 (E.D. Pa. 1981); *Willis* v. *Lascaris*, 449 F. Supp. at 759.

The third part of the test enunciated in *Eldridge* calls for evaluation of the government's interest, including the fiscal and administrative burdens incident to provision of additional procedural safeguards. While in some cases this consideration may counter the need for otherwise advisable procedures, in the case at a bar exactly the opposite proved true. Dr. Bendick

testified, and the district court found, that informative notices operate to reduce confusion among clients, and thereby reduce the number of phone calls and visits to the agency that seek nothing but clarification. This in turn frees up the time of caseworkers for other functions [PA 76-77].

Further, there was no administrative or fiscal burden attached to issuing an adequate notice. The defendants did not even argue that a proper notice would have been more expensive [PA 92-93, Conclusion 14]. Indeed, the Department's own computer expert testified that including the necessary information in the notices would have been an easy task, even with all of the problems B.S.O. was then facing, and would not have delayed the implementation of the earned income deduction change [PA 74-76, Findings 82 and 84]. Consequently, the district court was correct in concluding that the "governmental interest in not providing an informative notice is minimal at best" [PA 94-95, Conclusion 16].

Hence, it can be seen that the courts below identified the proper standard to be used in evaluating the process due the plaintiffs in this case and then applied that standard to the facts as they were shown to be. They then concluded that as a matter of constitutional law:

> notice of reduction or termination of need-based public assistance benefits must, at a minimum, inform the recipient of the actual amount of benefits being taken away and the relevant information necessary to ascertain whether an error has been made [PA 97, Conclusion 21].

This finding is entirely consistent with the very purpose of notice, as well as with the relevant case law.

Procedural due process has several components. *Eldridge*, 424 U.S. at 325 n.4. The first of these is "timely and adequate notice." *Goldberg*, 397 U.S. at 267. In order to be adequate, a notice must do more than merely inform its recipient that he or she has the right to request a hearing or even that a hearing

will be held without a request.[40] *In re Gault*, 387 U.S. 1, 33-34 (1967). Rather, it must contain sufficient information to "permit adequate preparation for an impending 'hearing.' " *Memphis Light*, 436 U.S. at 14; *Wolff* v. *McDonald*, 418 U.S. 539, 564 (1974); *In re Gault*, 387 U.S. at 33-34. This is because notice serves a different purpose than the hearing itself. It represents the stage of any process at which one must be able to *detect* an error. If sufficient information is not given to allow a person to evaluate the proposed action, the "right to be heard has little reality or worth" because it is impossible to make an informed decision "whether to appear or default, acquiesce or contest."[41] *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950). *See also*, *Goss* v. *Lopez*, 419 U.S. 565, 581 (1975). As Judge Weinstein of the Eastern District of New York recently recognized with regard to Medicare procedures, informative notice "is essential to due process, for if notice is inadequate other procedural protections become illusory." *David* v. *Heckler*, #79 C 2813 (E.D.N.Y. 7/11/84), slip op. at 24, citing *Gray Panthers* v. *Schweiker*, 716 F.2d 23, 32 (D.C. Cir. 1983).

It is not surprising then that virtually every court that has considered the reduction or termination of need-based benefits in mass change situations implicating individual factual issues has agreed with the courts below that, at a minimum, due process requires notice of the amount of benefits being taken away and sufficient information to ascertain whether an error is being made. *Banks* v. *Trainor*, 525 F.2d 837 (7th Cir. 1975), cert. denied, 424 U.S. 978 (1976); *Vargas* v. *Trainor*, 508 F.2d 485 (7th Cir. 1974), cert. denied, 420 U.S. 1008 (1975); *Philadelphia W.R.O.* v. *O'Bannon*, 525 F. Supp. at 1060-1061; *Jones*

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[40] *Memphis Light*, 436 U.S. 1 (1978), does not provide authority to the contrary. In *Memphis*, the contents of the notice were not at issue. *Memphis* simply holds that a notice must inform its recipients not only of the factual bases for the proposed action but also of the available avenues for redress.

[41] As the courts below found, every single appeal in this case was premised upon a blind guess. As the cases cited in the text declare, due process requires more.

v. *Blinziner*, 536 F. Supp. 1181, 1197-1199 (N.D. Ind. 1982); *Buckhanon* v. *Percy*, 533 F. Supp. 822, 833-837 (E.D. Wis. 1982), aff'd in part and rev'd in part on other grounds, 708 F.2d 1209 (7th Cir. 1983), cert. denied, 104 S. Ct. 1281 (1984); *Willis* v. *Lascaris*, 499 F. Supp. at 760; *Malanson* v. *Wilson*, #79-116 (D. Vt. 8/12/80), slip op. at 10-11; *Dilda* v. *Quern*, 612 F.2d 1055 (7th Cir. 1980), cert. denied *sub nom.*, *Miller* v. *Dilda*, 447 U.S. 935 (1980). These cases recognized that the critical focus was not on how many people were being affected by a given change, but rather on the likelihood that mistakes could be made in implementing it.[42] They concluded, as did the lower courts in this case, that the factual premises for decisions must be revealed if they are relevant to the outcome of a proposed agency action. As noted in Point IV-A, this is the very conclusion mandated by *Goldberg* v. *Kelly*.

C. The Notice Was Not Reasonably Designed To Convey The Required Information

The court of appeals and the district court both concluded that the December notice was also constitutionally inadequate because "[i]t was written at such a level of difficulty and in such format as to be incomprehensible to many of its recipients" [PA 100]. They reached this conclusion by applying the facts of this case to the standard set forth in *Mullane* v. *Central Hanover Bank & Trust*, 339 U.S. at 314-315, where this Court stated that a "notice must be of such nature as reasonably to convey the required information" and that "[t]he means employed must be such as one desirous of actually informing the [recipient] might reasonably adopt to accomplish it." These excerpts demonstrate that our jurisprudence has long deman-

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[42] The decisions in *Banks*, *Buckhanon*, *Philadelphia W.R.O.* and *Willis* are particularly instructive. All four cases involved "mass changes" in the Food Stamp or AFDC Programs. In each case the agency implemented the change based on pre-existing data in its files. The notices in *Banks* and *Buckhanon* were much more detailed than the notice at issue here, while those in *Philadelphia W.R.O.* and *Willis* were virtually identical. However, in each case the court concluded that due process required additional information.

ded that a notice must not only contain the "required information", but must also "reasonably convey" that information in a manner likely to be understood. In the view of both lower courts, the December notice did neither.

This conclusion was based upon overwhelming evidence. Plaintiffs produced uncontested and unimpeachable data that demonstrated that 45.8% of all heads of Massassachusetts food stamp households with earned income (the recipients of the December notice) have not completed high school, while 82.2% of that same group have a twelfth grade education or less [PA 62, Findings 43 and 44; JA 127]. They also introduced uncontradicted data and testimony indicating that public assistance recipients who have a twelfth grade education or less quite probably cannot read at more than an eighth grade level [JA 32-33, 112-114].[43] Neither of the defendants has questioned the validity of any of this evidence on appeal.

Both the plaintiffs and the state defendant employed experts to test the reading difficulty of the December notice and each testified at the trial. Both agreed that any meaningful analysis of a given passage's difficulty involved both a quantitative (statistical regression formulae) and qualitative (syntax, construction, etc.) evaluation [PA 56, 63, Findings 28 and 47]. The district court credited the testimony of the plaintiffs' expert in finding that pursuant to the most widely used reading formula, the Dale-Chall test, page one of the December notice tested quantitatively at the 9-10 reading grade level, while page two tested at the 11-12 reading grade level [PA 57-58, Findings 31 and 32]. That the court chose to believe the plaintiffs' expert in this case is not surprising in light of the fact that defendant's expert submitted five samples of his analysis; four of which contained errors in his client's favor [III CAA 223, 225, 234-244, 293-298].[44]

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[43] For a similar conclusion regarding the comprehension level of the elderly poor, *see David V. Heckler*, slip op. at 9-10.

[44] Having lost on the established facts below, the defendants have now gone to great lengths before this Court to call into question the validity of the Dale-Chall reading test. This approach overlooks the fact that the December

Plaintiffs' expert further testified that, taking into account subjective factors, the December notice was actually much more difficult to understand than would be expected from the quantitative evaluation alone, so that it was "unlikely that high school graduates could read and understand" it [JA 201].[45] Since 82.2% of the class members have only a high school education or less, that is the percentage that could not be expected to understand the notice sent to them. Consequently, based on language considerations alone, the district court's declaration that the notice was incomprehensible to many of its recipients was in fact an understatement.

Unfortunately, opaque and misleading language was not the notice's only shortcoming. The trial court, relying on undisputed testimony of plaintiffs' typography expert, found that the notice was printed in unacceptably small type,[46] and util-

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notice, when evaluated pursuant to several other widely recognized readability formulae, tested at an even higher level of difficulty [PA 60-61, Findings 39-41]. Further, the government's current attack calls into question the research and wisdom of the Secretary of Health and Human Services, who, as the record established, utilized the Dale-Chall test in rewriting S.S.I. notices of reduction and termination at a fifth-sixth grade reading comprehension level. 46 Fed. Reg. 42337, 42339 (August 20, 1981).

[45] Both defendants have religiously avoided dealing with the damning evidence regarding the qualitative difficulty of the December notice, despite the fact that their own expert testified that it was a crucial part of any meaningful analysis (and then chose to offer no opinion on the subject with regard to the December notice). Plaintiffs' expert found that the language of the notice would leave readers feeling like they were "reading a legal document . . . similar to . . . an insurance policy or a mortgage contract." [JA 29] See in this regard, *David* v. *Heckler*, slip op. at 27 (because Medicare notice uses language that resembles "officialese, federalese and insuranceese, . . . [i]t does not qualify as English.")

[46] The type in the December notice was almost exactly half the size required in this Court. Supreme Court Rule 33. It was also far smaller than that allowed by the Massachusetts Insurance Law, M.G.L. ch. 175, § 2B.1(b), the Retail Installment Sales Act, M.G.L. ch. 255D, § 9A, and the New York statute governing all consumer contracts and residential leases. N.Y. Civil Practice Law and Rules, § 4544. In fact, three of the witnesses were forced to use magnifying glasses just to make out the words [JA 140, 195; III CAA 128, ¶ 7].

ized grossly overlong line lengths with inadequate space between those lines [PA 68-69, Findings 63-65]. Further, three of the notice's four sides employed all capital letters, while one page was overinked and the other was underinked [PA 69, Findings 66 and 67]. There is simply no question that the courts below were totally justified in concluding that these factors all "served to increase the difficulty of reading and understanding the December notice" [PA 96-97, Conclusion 20; PA 21].

The approach utilized below in determining that the December notice was unconstitutionally deficient fits securely within the contours of this Court's prior teachings. On numerous occasions it has been recognized that the form of process that is acceptable in a given situation depends in part upon the capacities and circumstances of those to whom the process applies. Such is certainly the message of the *Mullane* case, and is one that was reiterated more recently in *Goldberg*, 397 U.S. 268-269, where the Court found that appeal by written submissions was "an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively."

That plaintiffs' education and comprehension level is a valid and necessary consideration in establishing the type of notice due them was again suggested in *Memphis Light*, 436 U.S. at 14, n.15. There, in determining that the notice at issue was not sufficiently clear to comport with due process, the Court opined that in different circumstances perhaps a less clear notice would suffice, but that:

> Here, however, the notice is given to thousands of customers of various levels of education, experience and resources. Lay consumers of electric service, the uninterrupted continuity of which is essential to health and safety, should be informed clearly . . .

This fundamental concept that a notice must be considered in light of those receiving it when determining whether it is in fact adequate has been recognized by numerous lower courts. *See e.g.*, *Gray Panthers* v. *Schweiker*, 652 F.2d at 167; *Viverito* v. *Smith*, 474 F. Supp. 1122, 1131-1133 (S.D.N.Y. 1979); and *David* v. *Heckler*, 79 C 2813 (S.D.N.Y. 7/11/84). It is a con-

clusion that comports with both common sense and the relevant case law of this Court, and is therefore one that the lower courts in this case were amply justified in reaching.

In the face of this factual and legal cornucopia of support for the findings of the district court, the defendants, while agreeing that *Mullane* provides the appropriate legal standard, nonetheless baldly proclaim that the December notice was reasonable. They assert that it was improper for the lower courts to measure reasonableness in the manner that they did, but they offer absolutely no alternative approach. It is apparently their belief that only they can decide that issue, utilizing undeclared standards that are impervious to judicial review. In support of this hypothesis, each misstates what the Department has been required to do and raises the specter of unlimited litigation and administrative efforts aimed at producing "the best notice possible." State Brief at 48.

The lower courts required no such thing. They were concerned with the minimum acceptable notice, not with what might possibly be done under ideal circumstances [PA 27-28]. That their evaluation was accomplished after-the-fact is of course inherent in the process of judicial review, and will remain the case no matter what standard is employed. Nonetheless, the trial court merely directed the Department to develop its *own* workable standards for future comprehensible notices.[47] Once such standards are established, the Depart-

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[47] The Department's suggestion that the decision of the court of appeals will require it to "engage in . . . market research" each time it issues a notice is absurd. State Brief at 46. The decision requires nothing more than a reasonable effort to write notices in simple, understandable language. This can largely be accomplished by utilizing a little common sense. (Compare the notice appended hereto at Appendix C, p. 12a, with the December notice [JA 4-5]). Furthermore, should the Department opt to use a readability formula, computer software is readily available for evaluating reading difficulty pursuant to all of the major reading tests. Indeed the Dale-Chall, Flesch and Fogg tests can be performed on home computers. Feldman and Casteel, *Using Microcomputers to Determine Readability Levels*, 20 Journal of Reading Improvement 82 (Summer 1983).

ment, by conforming its actions to those standards, will be less, rather than more, vulnerable to future litigation.

As all parties seem to agree, what is constitutionally mandated is that notice reasonably convey the required information. It is the historic and unique function of the courts to decide whether that constitutional requirement has been violated in a given case. That is all the lower courts did in this case, and they did so based on a plethora of evidence to inform their decisions.

Because the December notice did not contain the information necessary to allow households to make an informed decision about an appeal, and because the information that it did contain was written and presented in such a way as to make it incomprehensible to the majority of its recipients, this Court should affirm the decisions below which found that such a notice does not comport with the requirements of due process.

POINT V

THE COURT OF APPEALS APPLIED THE PROPER STANDARD OF REVIEW TO THE FINDINGS OF THE DISTRICT COURT

In a final effort to extricate itself from the overwhelming burden of the evidence produced in the district court, the Department argues that the court of appeals erred in reviewing the record under the "clearly erroneous" standard set forth in Fed. R. Civ. P. 52(a). The Rule provides an inappropriate guide, in the Department's view, for two reasons. First, the facts determined by the district court are not deemed to be of the historic type normally subject to the Rule. Second, those facts are perceived as so interrelated with the relevant legal framework as to require, at least in the context of constitutional litigation, independent review. State Brief at 78-79, 83. Addressing these propositions in reverse order, it can be seen that both are demonstrably incorrect.

Rule 52(a) of the Federal Rules of Civil Procedure provides:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Nothing in the text of the rule nor the decisions of this Court declares a general exception for factual determinations made in the context of constitutional adjudication. In *Rogers* v. *Lodge*, 458 U.S. at 622-623, the Court applied the clearly erroneous rule in reviewing a finding that the defendants had intentionally maintained a racially discriminatory at-large electoral system in violation of the Equal Protection Clause of the Fourteenth Amendment. Despite the fact that the finding of discriminatory intent involved numerous inferences applied within a complex legal framework (*Rogers*, 458 U.S. at 617-622), Rule 52(a) was found to provide the appropriate standard of appellate review. Similarly, in *Dayton Bd. of Ed.* v. *Brinkman*, 443 U.S. 526, 534 (1979), this Court applied Rule 52(a) to a finding of discriminatory animus in an equal protection challenge to a segregated school system. *Accord, Columbus Bd. of Ed.* v. *Penick*, 443 U.S. 449, 468 (1979) (Burger, C.J. concurring); *see also, Memphis Light*, 436 U.S. at 16. These cases demonstrate that the Department's reliance on *Watts* v. *Indiana*, 338 U.S. 49 (1949), and *Bose Corp.* v. *Consumers Union*, ___ U.S. ___, 104 S. Ct. 1949 (1984), is misplaced in support of its general contention that Rule 52(a) is an inappropriate vehicle for review in cases involving constitutional issues. Neither of those cases stands for so broad a proposition.

The *Bose* case involved a determination of actual malice in a case governed by *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), and the holding was expressly limited to that situation. *Bose*, 104 S. Ct. at 1967. The narrow exception to Rule 52(a) carved out by *Bose* was predicated upon the premier position of the First Amendment among our constitutional liberties. *See Bose*, at 1961. The fundamental importance of protecting free speech is reflected in the heightened burden of proof, by clear and convincing evidence, required to establish actual malice. Rule 52(a) has been held to provide a less useful vehicle for reviewing facts subject to such an exacting evidentiary stand-

ard. *See Baumgartner* v. *U.S.*, 322 U.S. 665, 671 (1944). However, none of the above considerations are present in the current case and *Bose* is therefore inapposite.

In *Watts*, this Court considered whether the circumstances surrounding the acquisition of a confession rendered that confession involuntary. However, the Court did not independently review the factual record. To the contrary, it was noted that:

> . . . any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved by the State's adjudication. Therefore, only those elements of the events and circumstances . . . that are unquestioned in the State's version of what happened are relevant to the constitutional issue here.
>
> *Watts*, 338 U.S. at 52.

Thus, the cases relied upon by the Department simply will not support the contention that Rule 52(a) is inappropriately applied in cases involving constitutional adjudication. In fact, this Court has expressly rejected the suggestion that it should "play a special oversight role in reviewing factual determinations . . . in school desegregation cases," noting that to do so would assert "an omnipotence and omniscience that we do not have and should not claim." *Columbus Bd. of Ed.* v. *Penick*, 443 U.S. at 457 n.6. As *Columbus* was decided on a constitutional basis, there is certainly no reason in the current case to depart from its teaching of restraint.

In support of its alternative argument, regarding the nature of the facts at issue, the Department cites two findings of the district court which it feels do not represent the types of factual determination that ought to be reviewed pursuant to Rule 52(a). These are the findings concerning the comprehensibility of the December notice and the risk of error surrounding the reductions and terminations that it attempted to announce. However, both of these determinations were predicated upon exactly the kind of historic facts that fall within the ambit of

Rule 52(a). For proof of this contention, one need look no further than the Department's attempts to undermine those findings.

As to the factual finding that the December notice was incomprehensible to many of its recipients, the Department attacks the reliability of the reading difficulty test utilized by the district court. It must do this, of course, for if the test is valid, its conclusion regarding the difficulty of the notice, when compared to the established education levels of the plaintiff class, demonstrates beyond dispute the accuracy of the district court's finding. There are, however, several problems with the Department's approach. First, neither it not its counsel have demonstrated that they are in any way qualified to evaluate the reliability of a reading test.[48] Second, the Department's own reading expert testified that he considered the Dale-Chall test to be the most accurate available [JA 236]. Finally, this Court has specifically held that Rule 52(a) is especially appropriate in cases involving expert testimony because "so much depends upon familiarity with specific scientific problems and principles not usually contained in the general storehouse of knowledge and experience." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 339 U.S. 605, 610 (1950). Thus, the Department's attack on this aspect of the findings below demonstrates exactly why Rule 52(a) was appropriately utilized in this case.

The belated attempt to discredit the concurrent findings of the district court and court of appeals regarding the substantial risk of error is equally unavailing. Contrary to the Department's representation, the record in fact demonstrates that a minimum of 745 households (over 4.5%) were erroneously reduced or terminated due to ascertainable computer pro-

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[48] Indeed, to imply that the absence of certain food stamp terms from the Dale list of familiar words somehow undermines the trustworthiness of the test bespeaks a profound misunderstanding of the nature of statistical regression formulae in general and the Dale-Chall test in particular [JA 190-193, 207, 210, 236-237].

gramming errors[49] [PA 82-83, Finding 107; JA 44]. This figure of course does not begin to reflect the additional predictable mistakes resulting from the Department's self-confessed data entry backlog throughout the relevant period of the benefit reductions [PA 78-80, Findings 91-97]. In response to this avalanche of data reflecting the administrative chaos at that time, the Department cites this Court to yet another computer programming error and claims that because it allegedly corrected that flaw, the district court's findings should be deemed worthless. However, the very purpose of both Rule 52(a) and the two court rule is to insulate this Court from just such *post hoc* sniping at the record and findings made below. As the Court has stated:

> A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.
>
> *Graver Tank*, 336 U.S. at 275.

The Department's tardy attempt to undermine the factual premises of the district court's findings has in fact revealed nothing approaching a reversible error. It has, however unwittingly demonstrated the wisdom of applying Rule 52(a) to the present case.[50] Therefore, the Court should affirm the standard utilized by the First Circuit in its review of the findings of the district court.

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[49] This minimum figure for the class is derived by extrapolation from the 211 cases identified in the random sample.

[50] Were this court to accept the invitation to undertake an independent review of the record, plaintiffs suggest that it, like the court of appeals, would find "ample support" for the findings and conclusions of the district court [PA 21].

CONCLUSION

The judgment of the court of appeals should be affirmed on the merits, but the relief granted by the district court should be reinstated.

Respectfully submitted,

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Dated: August 24, 1984